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THE MODERN IDEA OF THE STATE

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AUTHORIZED TRANSLATION WITH AN INTRODUCTION

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TRANSLATORS' INTRODUCTION

The value of the more general and abstract efforts of political theory, of what may perhaps be called the philosophy of the state, is often questioned. It is urged on the one hand that the true science of politics cannot go beyond the study of the actual organization of government and of its relations to other social and economic institutions. On the other hand, it is asserted that political philosophy, because it is necessarily *a priori* in method, cannot do more than ring the changes on certain fundamental types of theory which were stated once for all in the far-distant past. Thus, for example, Professor Dunning in his recent book on *Political Theories from Rousseau to Spencer* says, "Greek Thought on this problem [the justification of authority and submission] in the fourth and third centuries before Christ included substantially all the solutions ever suggested." [1])

Nevertheless, with some ups and downs, political philosophy goes on; it is one of those subjects of permanent human interest which, whether "scientific" or not, men are not likely to abandon. To be sure, it does at times degenerate into an apology for special interests in their endless struggle for power. This danger can scarcely be avoided when men undertake to weigh values and to estimate the importance of tendencies that have not yet eventuated in political fact. But notwithstanding this danger, the criticism of principles is indispensable. The notion that political theory can be reduced strictly to an analysis and summation of accomplished political facts is really idle. The political theorist must no doubt feel the scientific reverence for fact as keenly as any other thinker, but he cannot escape

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[1]) P. 416.

from the fact that his subject matter, unlike that of the physical scientist, includes an ideal dimension. For political institutions are not unchangeable, nor do they change solely under the influence of objective conditions. At bottom political phenomena belong to the realm of mind and mind is always in part an unrealized plan for the future, as well as a record of accomplishment. Political theory certainly cannot neglect what is, but just as little can it close its eyes to what ought to be, for what ought to be is an ineradicable element of man's experience in his political relationships and a real force in his conduct.

Consequently political thought has always included, and must always include, not only the generalization of facts but also the valuation of tendencies. It is a product of the need to clarify the mental vision, to see present events clear and whole in the endless struggle for a more reasonable reconstruction of the conditions of human life. And the wholeness of institutions includes what they are becoming quite as much as what they are. The notion that political philosophy consists of a few abstract principles, once for all completed in the hands of the Greek Philosophers, has in fact done serious injury to the political thought of the nineteenth century. A return to the Greek's clear perception of the fact that social relations are the indispensable condition of the individual's good was undoubtedly a useful corrective to the abstract individualism of the natural rights philosophers. It can easily be understood why political thinkers turned to Plato and Aristotle for a saner point of view than that which they inherited from the era of the Revolution. But to treat the Greek city state as an analogue of the modern national state is merely to forget the long story of Rome and the Middle Ages, to lose sight of the enormous upheaval of values that accompanied the rise of the Church and its dissolution at the Reformation, and to neglect the rise of feudalism and its fall before the advances of commerce and industrialism. The supposition that behind all this there is an unchanging body of political principles is merely the last illusion of seventeenth century rationalism. Throughout the twenty-three centuries since

Aristotle, political theory has stood close to the centers of change from which the modern state finally emerged. It has sought continually to describe and evaluate these forces of change, to create the conditions of rational foresight, to supersede muddle by direction. From time to time it has gone back to Greek thought for inspiration, but the inspiration lay less in the borrowing of specific theories than in the ideal of an intelligence which in the midst of change can look before and after and so make itself master of its fate. That it borrowed from the past is less important than that it aimed to adapt its borrowings to new times and new conditions. Let it be granted that political theory at its worst can become special pleading. Nevertheless the continuous criticism of ideals and tendencies remains an indispensable part of its function.

This function is at once negatively critical and constructive. The march of events is not wholly conscious, nor conscious to all men equally. Ideas and ideals which once corresponded to social and political fact become outworn and obsolete. They become not only fictions but obstacles to the solution of new political problems. It is the function of the political thinker to display the unreality of such notions, in order that the ground may be cleared for a more adequate conception of political relations. Institutions, like habits, can bind and fetter the mind, when they issue in conduct that has ceased to be suitable. The legislator and the administrator, as well as the man in the street, needs to have the cobwebs of obsolete theory cleared from his mind. Criticism is the sole means of re-establishing a clearer vision of political and social realities. But for this purpose no amount of merely negative criticism will suffice. The political theorist cannot avoid some of the functions of statesmanship; he must seek the *whither* no less than the *whence* of institutions; he must estimate the forces at work and their direction. The value of a political theory depends not only upon its recognition of achieved fact and on the logical thoroughness of its synthesis, but also upon its grasp of fact *in posse*. Thus it was that Hobbes, who far surpassed Locke in the force

of his logic, was yet less effective than the latter, for he failed to see the forces and tendencies that were ushering in constitutional government.

The work of Professor Krabbe which is here presented in translation is a notable effort both to show the insufficiencies of current political theory and to outline the new form which political relationships are assuming. His criticisms are directed at the fundamental conceptions of accepted theory and they portend a radical reconstruction of theory in the light of changes which are visibly taking place in contemporary politics. His theory makes no pretense to finality or even to completeness. It is subject to revision in the light both of criticism and of data not yet brought to bear upon the problem. In its main features it is in accord with the criticism of the state by other scholars, a volume of criticism which has reached proportions that make it a phenomenon of first-rate importance in political science at the present time. The impartial reader must form his own judgment of the worth of this criticism as against traditional theories and also of the adequacy of Professor Krabbe's special contributions to a constructive theory.

Such a constructive theory looks forward not only to changes in the structure of political science but also to impending transformations of government. But it is impossible to visualize in detail before they occur the changes in the organization of government which the theory implies. The organization of parliamentary government was presaged by Locke's *Treatises* and the American constitutional system was suggested by the theories of Locke and Montesquieu. Yet no contemporary of those writers could have foreseen in detail the course of development which government in England and America would take. To conservative minds of their day their theories appeared both speculative and anarchical. If the reader of this book feels a like difficulty in envisaging a constitution satisfactory to practical requirements, he must remember that the process of giving legal expression to dynamic ideas is slow and is accompanied by a deal of experimentation. Practical constitu-

tions are achieved by the process of trial and error, but always more or less under the guidance of ideas. The justification of a political theory does not lie in the presentation of a fully elaborated scheme of government but in a truthful expression of the trend and strength of political forces.

I. THE HISTORY OF SOVEREIGNTY

The corner-stone of political theory has long been the principle of the state's sovereignty. In order to make clear the importance of this conception it is necessary to review briefly its history. This question was discussed at length by Professor Krabbe in an earlier work entitled, *Die Lehre der Rechtssouveränität*, 1906, to which the work now translated is a sequel. The former work is largely a critical and historical analysis of the conception of the state and of its relation to law. On the ground cleared by this criticism the present book undertakes to lay down the foundations of a new theory of the state.

The conception of sovereignty belongs essentially to modern political theory. It is sheer confusion to identify autarchy or self-sufficiency, which Aristotle asserts to be the distinguishing mark of the state, with the modern sovereignty. The former is an ethical conception; the latter is political and legal. The self-sufficing state is one which is equipped with all that is necessary to the good life. Political independence may be one element of this equipment but it is not more essential than economic self-sufficiency. Autarchy means the ability of the state to satisfy all the needs of its citizens. Nor did the Romans possess the conception of sovereignty, though the Roman law came to recognize that the emperor's right to command is inherent in his position. This principle of law was utilized later when the theory of sovereignty came to be formulated, but the assertion of sovereignty carries with it the suggestion and rejection of a possible division of authority. Such a possible pluralism was in fact altogether foreign to Roman thought and practice.

A universal state, a universal law, a universal language, and eventually a universal church were the characteristic expressions of the Roman genius.

It was not until the Middle Ages that the conditions of such a pluralism existed and then they existed everywhere. Authority is everywhere divided, dispersed, and questioned. Church and state, pope and emperor, emperor and king, king and baron, lord and vassal are in continual opposition. Society is divided into estates which are often in a high degree class-conscious, but nowhere is there a national consciousness. Decrees of emperor, pope, and king, which frequently conflict with one another, are opposed and checked by local law and custom. Nowhere is there an unambiguous authority standing at the head of a unified political and legal system. From this welter of conflicting authorities and rival jurisdictions the national staet eventually emerges and with it the political conception of sovereignty.

This phenomenon is connected essentially with the rise of the monarchy. In the earlier Middle Ages the strife of authorities had centered about the controversy between the pope and the emperor. This struggle, however, was gradually eclipsed in the controversies which arose from the efforts of the national king to extend his authority within the limits of his own territory. In the beginning the supremacy of the king's authority is by no means admitted. He is limited by the claims of both the great powers which had been contesting with each other the claim of supremacy. The emperor's claim to universal secular authority is perhaps theoretical, but the power of the Church within the kingdom is often real enough. The independence of the ecclesiastical courts, the immunities of the clergy from civil authority, and the power of the Church to collect tithes are examples of the serious impairment of the king's authority within the national territory. Apart from the ancient powers of Church and Empire, the feudal nobility could often defy his decrees. When an angry king, on saying to a powerful retainer, "You shall either go or hang," could receive the truthful re-

sponse, "I shall neither go nor hang," [1]) there was obviously no such attribute as sovereignty attaching to the king's authority. Again, a like independence of central control was often successfully asserted by the cities. "We will have no king but the Mayor," was the haughty assertion of the citizens of London.

But it was not merely the resistance of individual barons, cities, or ecclesiastical corporations that the king had to face. Linked together in the "estates," these elements of society were long able to meet the king on more than even terms and seriously impede the growth of royal power. The English Parliament in the Middle Ages did not represent the people as a whole but some hundreds of corporate bodies and powerful lords. The probable etymology of "commons" is "communities" or corporate bodies. [2]) The House of Commons was the assembly of the counties and boroughs, — the corporate bodies, — of the realm, not a representative assembly of the common people. Unlike the pope and the emperor, the estates did not presume to set themselves above the king, but they did claim a co-ordinate position or insisted upon their independence of him. The political relation of sovereign and subject is quite foreign to this mediaeval political structure; the relation between the king and the estates is virtually contractual. Thus Magna Charta is to be viewed as a sort of treaty between the great barons and the king, not as a constitutional guarantee of popular rights.

But time and the forces of integration were on the side of the king. As M. Monod has expressed it, "We can follow through the feudal epoch the development of the monarchical idea which was to destroy feudalism, as we can follow across the monarchical epoch the national idea which was to throw dynastic interests back into the second place." [3]) The rise of the national state is the outstanding political event of modern history and it is the achievement of a period of royal absolutism. In this

[1]) Dicey, *Privy Council*, p. 2.
[2]) Boutmy, *Constitutional Law*, p. 157.
[3]) *Revue historique*, Vol. XLIII, 1890, p. 95.

respect the development of government in England was more than a century in advance of that on the Continent, but in both cases the development followed the same line. The work of Henry VIII and Elizabeth was substantially similar in aim to that of Louis XIV or Frederick William I. It was a work of consolidation, unification, nationalization. The later evolution of popular constitutional government could certainly not have followed the course it did, had not provinces been joined into kingdoms, local groups been welded into nations, and the conflicting medley of feudal rights, privileges, exemptions, and authorities been reduced to a unified political system. This was the task of absolute monarchy.

The theoretical corner-stone of this absolute personal power is the concept of sovereignty. This conception sets up the ideal of a legal independence free from all external control and a legal supremacy over all the internal affairs of the kingdom. It was an ideal which obtained its force from the long controversies in which numerous authorities, — Empire, Papacy, feudal nobility, free cities, ecclesiastical corporations, and king, — had vied for the right to exact obedience. It is for this reason that the conception of sovereignty belongs peculiarly to modern times; ancient times knew no conflicts of authority which could have called such an ideal into being.

In particular it was the king of France who in the sixteenth century achieved the title to be described as "in his own kingdom, as it were, a corporeal god." And in 1576 Jean Bodin first formulated a definition of the state which made sovereign power its essential characteristic. The state consists of citizens subject to some sovereign power and "sovereignty is the supreme power over citizens and subjects, unrestrained by the laws." [1]) The sovereign is the source of law and, as such, cannot be bound by it; he is subject only to the divine law and to the law of nature, and is responsible to God alone for his acts. Political theory thus joined hands with political policy; as Machiavelli had prescribed the concentration of power in the

[1]) *De re publica*, Lib. I, cap. VIII.

hands of the princes as the only means of uniting Italy, so Bodin, in the midst of civil war, celebrated in his theory of sovereignty a similar concentration in France, which was about to be consummated in his day. Moreover, this theory conformed quite simply to the most significant tendency of the century, the fact that the king was not subject to the Pope, owed no fealty to the Emperor, and within his kingdom was struggling toward a position in which he could legislate for the whole body of his subjects and enforce the law directly upon them by his own officers. The famous claim imputed to Louis XIV, "I am the state," was in part simply a statement of fact; for the rest, it was a somewhat crude way of stating a great political ideal. The theory of sovereignty was an invaluable weapon in the hands of the monarch in his contest with the other claimants to authority; it gave a theoretical foundation for the emerging national absolute state, and it clearly forecast the line that political evolution was to follow. It is clear, therefore, why political philosophy regarded the relation of subject and sovereign as the fundamental political fact.

It is true that the authority of the king, even in the period of the most extreme absolutism, did not reach to the lengths that the theory demanded. Theoretically the law owed its validity to the will of the king, even though it might rest upon an immemorial custom which long antedated the rise of the king. More and more, however, the enforcement of customary law fell into the hands of royal officers and it was possible for Bodin to maintain that custom cannot be law without the sanction of the royal will. But custom and established law are stubborn facts and the truth is that no absolute monarch ever actually obtained more than a very limited power to impose his will upon that common law of the folk or people which for the most part determined the legal relations between private persons. In France the local customs remained largely intact throughout the absolute monarchy and down to the Revolution, in spite of various projects for a general codification. The king really exerted only a slight legislative authority over pri-

vate law. "Down to the end of the *ancien régime* the king of France did not touch the private law except in the rarest cases. This law remained essentially a local and customary law. Policy, administration, and police duties are the chief objects of official action. And this is in fact the king's sphere of action. His ordinances and decrees are from the beginning administrative; they are not civil laws.... To sum up, the chief fact which dominates our history is the relative impotence of the king over private law." [1])

On the other hand, the absolute monarchy concentrated in the hands of the king the power to legislate in matters of administration and his mandates to his officials became the source of administrative or public law. Only in England, where the rise of Parliament prevented the differentiation of public from private law, was there a unified law having authority over officials and private persons alike, and a single source of law, the King in Parliament. But in this respect again political evolution in England was ahead of that on the Continent. With the extension of the representative system and the growth of the power of parliament over the administration, the state did in fact achieve a completer unification of the law than the absolute power of the monarch was able to bring about. The representative assembly gradually absorbed legislative power until the tatute was not only a limitation upon the competence of the administration but the basis of that competence. We shall have occasion again to refer to this relation between the state and the law.

The theory of sovereignty could not remain merely an assertion of the supremacy of the royal will, for the will of the monarch, in England at least, presently came to be of little moment. The tendency of constitutional government was directly away from arbitrary personal power and the chief aim of Locke's political theory is to determine how power can be subject

[1]) Paul Viollet, *Histoire des institutions politiques et administratives de la France*, Vol. II, pp. 198 ff. Cf. Krabbe, *Die Lehre der Rechtssouveränität*, Ch. III, from which the quotation is taken.

to legal limitation. His ideal is government subject throughout to law. With Hobbes plainly in mind, he scouts the notion of a contract which makes all men but one subject to law.[1]) Unfortunately, however, Locke was not able to make clear how the law-making power can itself be subject to law. His theory is that ultimate power rests with the people and that political obedience is due to "the public will of the society," the prolific germ of all the later theories of popular sovereignty. In point of fact, the net outcome of the Revolution of 1688 was to transfer the sovereign power from the king to Parliament, leaving the conception of sovereign power itself largely unchanged. The assumed unity of the sovereign was for a time shaken by Montesquieu's doctrine of the separation of powers. But the development of the ministerial system and the concentration not only of the royal prerogative but of all executive powers in the hands of a ministry responsible to the House of Commons made the legal omnipotence of Parliament the cardinal principle of British government. The work of Bagehot in the middle of the nineteenth century established firmly the idea of parliamentary sovereignty.

The theory of popular sovereignty, which fell somewhat into abeyance after the Revolutionary Period, got a new lease of life from the rapid growth of institutions which made Parliament more directly amenable to the control of public opinion. With the extension of the suffrage by the three reform bills, there came visibly into existence and power a new element in the state, the electorate. Not only was the House of Commons, which had come to be nearly equivalent to Parliament, dependent upon the voters through elections, but not infrequently its decisions were made the subjects of appeal to the electorate through dissolutions and new general elections. In the face of this new factor in the state, could one speak with propriety of parliamentary sovereignty? Was not the electorate sovereign? And yet, if Parliament was dependent upon the electorate, it was no less true that the qualifications of voters, the terms and

[1]) *Treatises concerning Government*, II, Sect. 90 ff.

conditions of elections, indeed the possibility of elections themselves, all rested upon statute, which was merely the expression of Parliament's will. Was Parliament sovereign or was the electorate?

The confusion was increased by the fact that as a rule no clear distinction was made between the electorate and the people. The theory of popular sovereignty, as outlined by Locke and developed by Rousseau, attributed the sovereign power to the entire body of citizens, a much more inclusive category than the electorate. English political theory was not greatly influenced by Rousseau's philosophy, but nevertheless the idea of popular sovereignty even in England has meant sometimes the sovereignty of the voters and sometimes that of all the citizens. It was to resolve this confusion over the location of sovereignty that the theory of two sovereign authorities came to be generally accepted by recent writers on English constitutional law. There is a legal sovereign, Parliament, and a political sovereign, the electorate or the people. Thus Professor Dicey emphasizes the distinction between legal and political sovereignty. "Parliament," he says, "is, from a merely legal point of view, the absolute sovereign of the British Empire, since every Act of Parliament is binding on every Court throughout the British dominions, and no rule, whether of morality or of law, which contravenes an Act of Parliament, binds any Court throughout the realm. But if Parliament be in the eye of the law a supreme legislature, the essence of representative government is, that the legislature should represent or give effect to the will of the political sovereign, i. e., of the electoral body, or of the nation."[1]) But with reference to this last clause, it may be asked, Which is the political sovereign, "the electoral body," or "the nation"? Certainly the two are not identical.

The theory of popular sovereignty has never been able to arrive at logical clearness. The truth is that it has in it two elements which refuse to combine. As has been pointed out above, the conception of sovereignty as it originated with

[1]) *Law of the Constitution*, Ed. 8, p. 425.

Bodin was a defense of the claim to ultimate authority embodied in the person of an absolute monarch as representative of the state. After the Revolution such authority was not attributable to the king alone but it was transferred to the King in Parliament. But it was certainly not the main purpose of the Revolution merely to change the location of absolute authority. The primary purpose, as Locke perceived, was to obtain guarantees that authority should not be exercised arbitrarily by the king or indeed by any group of men. The first effective opposition to James came from spokesmen of the Common Law like Edward Coke and was directed against an arbitrary use of the royal prerogative. The opposition was not to authority as such, but to an identification of authority with the free will of the monarch. Certainly John Locke would have been no more tolerant of an identification of authority with the free will of Parliament. Even the enactments of that body had to justify themselves by agreement with the law of nature; the function of positive law was to attach penalties to violations of natural law. [1]) This removal of arbitrariness from authority was always the essential moral idea behind the theory of popular sovereignty; it is still the essential idea behind Professor Dicey's theory of public opinion as the political sovereign. What is essential is that Parliament is responsible, morally if not legally, for its use of authority. Behind the fact of specific enactment lies the further fact that the representative body speaks for the nation. But the logical difficulty presented by this attempt to endow a group of persons with absolute authority and yet make them responsible for its exercise is really insoluble. It is the familiar philosophical difficulty of an absolute which is nevertheless limited, and this is neither more nor less than a contradiction in terms. Nevertheless, as was said above, the theory of popular sovereignty, even as it was stated by Locke, was grasping after a principle of fundamental importance in the evolution of the modern state. This is the principle that at bottom political authority is not merely personal; it does not inhere in the will

[1]) *Op. cit.*, Sect. 88.

of any man or any group. But this conception can be developed only by a profound modification of the notion of sovereignty. In spite of itself any theory of sovereignty ends in a personal authority, a right inhering in some will to impose its commands upon other wills. It is just this which is at variance with the other notion of a responsibility for the exercise of authority. No modern theory of responsibility can run in terms of an inherent superiority of will.

The relatively early establishment of Parliamentary power in England and the fact that Parliament was relatively amenable to public opinion are doubtless responsible for a phase of English political theory which has often been remarked, viz., the fact that the conception of the state and its sovereignty has had far less importance in it than in Continental and especially in German political thought. It has long been true, as Professor Dicey says, that "Englishmen are ruled by the law, and by the law alone." [1]) On the Continent authority retained much longer the personal quality which was implied in the original notion of sovereignty. For German political thought in particular, the inherent authority of the state was an axiom and the location of this authority in the will of some assignable person or persons was far more plausible, at least during the first three-quarters of the nineteenth century, than it was in England. The theory of popular sovereignty, while not unknown, was relatively less important. The constitution was more likely to be regarded as theoretically a grant from the monarch than as an expression of the sovereign will of the people, as it was conceived to be in the United States. And so long as the principle of ministerial responsibility was not accepted, the representative body could not attain the central place in the government which Parliament held in England. In effect, German political thought before the rise of the juristic theory of the state, which we shall reserve for treatment in a later section, remained an attempt to locate the assumed absolute authority of the state in specific ruling persons. If the ultimate authority

[1]) *Op. cit.*, p. 198.

was conceived to rest theoretically with the people, the effective "bearers" of this authority were quite tangible individuals. And for not a few political theorists, the monarch was not only the "bearer" but the very personification of political authority. Thus von Seydel says, "The monarch is not an organ of the state; he is the ruler or sovereign over it." "The royal authority does not rest upon the constitution; the constitution rests upon the royal authority." And Bornhak, "The whole power of the state is the power of the prince and all constitutional law is the law of the prince." [1])

Nevertheless the attempts to locate sovereignty grew constantly more difficult. This was due mainly no doubt to the fact that the persistent trend of political institutions was away from personal authority. More and more the representative assembly made good its claim to a control over administrative officials. Statutes became less a limitation upon the competence of officials and more the basis of their competence. The power of the king to make statutes dependent upon his sanction fell more and more into abeyance. The doctrine that authority can be traced to its source in assignable persons having a pre-eminent status became less and less in accord with the facts of government as actually carried on by the modern state. Moreover, the growing complexity of the state increased the difficulty. The attempt to locate an indivisible sovereignty in the federal state was quite hopeless and yet logic demanded that absolute authority should be by its very nature indivisible. Sovereignty could not be divided without destroying the integrity of the conception, but if it were not divided, political theory could not be made to reflect political fact even passably. The essentially personal nature of the conception demanded that it should be the attribute of some discoverable being, and yet in the federal state especially it could not be located in any single being.

[1]) Von Seydel, *Bayerisches Staatsrecht*, 1884, Vol. I, pp. 352 ff.; Bornhak, *Preussisches Staatsrecht*, 1884, p. 64. The passages quoted are taken from Professor Krabbe's *Lehre der Rechtssouveränität*, Section 12, where German theories of constitutional law before the juristic theory are dealt with more at length.

The difficulty was felt wherever the federal form arose, in Germany as well as in the United States. Every American is familiar with the confusion that the theory of sovereignty fell into when it was applied to the explanation of our government. The long controversy over the question whether sovereignty in this country is vested in the federal state or in the member states, or is divided between them, has occasioned more practical and theoretical difficulty and has been the subject of more theorizing than any other in our political history. Even if it be assumed that sovereignty is an attribute of the federal state and that the member states are not sovereign, it is still impossible to discover the seat of this sovereignty. It certainly is not to be found in Congress or in the President. Attempts have been made to fix it in the Supreme Court, but a body which is appointed by the President and Senate and whose members are removable by an impeachment process instituted by the House of Representatives, which possesses no independent financial support, and the execution of whose decrees must ultimately depend upon the executive branch of the government can scarcely be described as sovereign. Nor is the attempt to locate the sovereign in a national constitutional convention more satisfactory. A body which has met only once in the history of the country, a century and a third ago, and whose work was then not legally valid until it had been ratified by other bodies in the several states, is certainly not sovereign in any intelligible sense. Nor is it more conducive to clarity to vest sovereignty in "the amending process," that is, in two-thirds of each house of Congress and three-fourths of the state legislatures. Can a *process* be sovereign? And a process which takes place only occasionally and requires the co-operation of seventy-four representative bodies? In fact, all that can be said is that, "By whomsoever, or whatsoever body, the will of the State is expressed, and law created, there we have Sovereignty exercised." [1]) But this merely re-affirms the general theory. Sovereignty mani-

[1]) W. W. Willoughby, *The Nature of the State*, pp. 302 f.

festly resides in no single agency of the federal state and therefore American political theory has generally taken refuge in some vague notion that sovereignty inheres in "the people." This may serve to cover up the problem but it solves nothing. For if "the people" means merely the whole body of citizens, this is a thoroughly amorphous body which has no legal or political significance; all that can be meant is that government is somehow responsible for its use of authority. If on the other hand "the people" means the voters, the difficulties are similar to those which attend the identification of any other governing organ with the sovereign. The voters do not form a unified body having a collective capacity and in any case the qualifications of voters are settled by statute or constitution.

All these attempts to fix sovereignty in a particular element of the state, — state-organ theories of sovereignty, as they have been called, — are futile. In the modern state, and particularly in the federal state, it is not possible to trace authority to a single fountain-head in an assignable group of persons or functionaries. The complexity of the political structure forbids this, but behind the mere proliferation of organs lies the substantial fact that political authority in the modern state is not personal. Men have ceased to think in terms of a hierarchy of authoritative wills. The modern political structure has developed along different lines. Hence the attempt to find a tangible sovereign is nothing but an attempt to force modern political institutions into a mold of thought which applied to an altogether different state of the facts. The last generation brought a reaction in German political science against these state-organ theories. The attempt to locate sovereignty in any specific organ was abandoned and the view was adopted that sovereignty is an attribute only of the state itself. This theory of the juristic personality of the state will be considered in a later section. Before taking up this question, however, it will be well to point out another class of difficulties encountered by the theory of sovereignty in respect to the relations between states.

II. SOVEREIGNTY AND INTERNATIONAL LAW

While the theory of sovereignty met with serious difficulties in its attempt to explain the internal organization of the state, it was menaced from without by the development of international law. The doctrine of sovereignty, as we have seen, developed at the time when the national state was emerging from the welter of conflicting jurisdictions which was typical of the Middle Ages. It was an accurate explanation of the condition in which the national state found itself when, through the agency of absolute monarchy, it had succeeded in throwing off all dependence upon the Empire and Papacy and in subjecting to its complete control the various classes and estates within its borders. The national states of Europe at the beginning of the seventeenth century were in fact sovereign. But there began immediately to develop a system of rules which the states themselves recognized as binding in their relations with one another. International law, which previously had been nonexistent, rapidly developed a system of control over the members of the "family of nations." What was the nature of this body of rules, obedience to which was recognized as the duty of each state? Grotius, who first attempted a formulation of these rules, called them "law" and derived them from nature, as other rules were derived from the law of nature. The term "international law" came to be firmly fixed in common usage. The Austinian School of Jurisprudence, to be sure, were aware that international law could not be brought within their definition of law as the command of a sovereign; for them international law was a branch of morality rather than of law. It rested upon the consent and agreement of the various states, not upon the sovereign will of any one state. Moreover, it was not enforceable by pains and penalties; it did not possess effective sanctions. Hence, though it was doubtless morally binding upon states which had accepted it, it lacked the essential quality of law. This view was never current on the Continent, but in England and America it obtained wide-spread if not general acceptance.

The remarkable expansion of international law since the middle of the nineteenth century, and especially the beginnings of a real international organization, have made the problem of its nature one of serious importance to students of legal philosophy and political science. The Austinian definition of law has been recognized as altogether too narrow. Studies by Sir Henry Sumner Maine revealed numerous systems of law which existed without any mandate by the state and were enforced by other means than penalties inflicted in the courts. Indeed, as Mr. Elihu Root has pointed out, obedience to our ordinary private and criminal law is enforced more by the social sanctions, the pressure of public opinion and the opprobrium to which the law-breaker subjects himself, than by the fear of fine or imprisonment. A definition of law which excludes such fundamental principles of the English Constitution as that the ministry, upon an adverse vote by the House of Commons, must either resign or appeal to the electorate, is clearly too restricted. This rule, though a well established principle of the English Constitution, is in no way enforceable through the courts; it finds its sanction only in a general consensus, a public opinion, but this sanction is entirely effective.

It is a necessary corollary of the strict doctrine of state sovereignty that all members of the family of nations are on an absolute parity. The great powers and the small states alike occupy positions of complete equality in international relations. Anything like the subordination of some to others is altogether incompatible with their character as sovereign entities. But the actual development of international relations belies this theory. What have come to be known as the great powers have assumed a greater and greater control over the entire field of international affairs, until their privileged position has come to be recognized definitely in the Covenant of the League of Nations. The old doctrine of state equality is clearly a fiction. But if states are not all equal, if some are superior and some inferior, what becomes of the doctrine of sovereignty?

Furthermore, as an effective international organization

takes form, it is becoming evident that even the great powers are subject to a control that does not rest upon their voluntary acquiescence. There is in fact an international *law*, which is imposed upon states, large and small, from above. Its mandates are not enforced by the ordinary pains and penalties of fine and imprisonment, but by the same kind of sanctions as those which guarantee many of the principles of the English Constitution, the sanction of public opinion. International law is a body of rules of conduct governing the relations of states, not derived from their voluntary agreement but from the same source as all other law, and not dependent upon their voluntary consent for its effectiveness but enforced by the public opinion of the world. It is obvious that the mere existence of such a body of rules is incompatible with the doctrine of sovereignty. It is safe to assume that the more extended and the more effective such law becomes, the more completely the doctrine of state sovereignty will be undermined.

III. THE STATE AS A JURISTIC PERSON

We saw at the end of Section II how the state-organ theories of sovereignty fell into disrepute because no theory of political organization on this foundation could be made to agree with the facts of government as actually carried on. We turn now to the theory of the juristic personality of the state, which was an attempt to meet the difficulties encountered by the older type of doctrine.

Ground was broken for the theory of juristic personality by von Gerber as early as 1865. In the hands of Laband, Rosin, Preuss, and Jellinek it became the prevailing German theory of the state. [1]) The theory regards all attempts to locate sovereignty in specific organs of the state as fallacious. They are

[1]) Von Gerber, *Grundzüge eines Systems des deutschen Staatsrechts*, Ed. 1, 1865; Paul Laband, *Staatsrecht des deutschen Reichs*, Ed. 1, 1876; H. Rosin, *Souveränität, Staat, Gemeinde, Selbstverwaltung*, Hirths Annalen des deutschen Reichs, 1883; Hugo Preuss, *Gemeinde, Staat, Reich als Gebietskörperschaften*, 1889; Georg Jellinek, *Allgemeine Staatslehre*, Ed. 1, 1900. The theory of the juristic personality of the state is discussed by Professor Krabbe, *Die Lehre der Rechtssouveränität*, Section 13.

due to the persistence of an *a priori* and deductive method in political science. Starting from sovereignty as a first principle, the older theory sought to elaborate this conception in a schema of "powers," logically essential to the state as such. The state is thus a unit which necessarily manifests itself in certain powers of government; these powers reside in specific agencies all of which derive their authority from a single central reservoir of power. What is assumed, therefore, is an hierarchical organization of government according to a logical scheme by which all the powers of government can be brought forth from the idea of the state. Hence political theory becomes an attempt to locate the ultimate source of authority and to trace out the channels by which it flows from its source to the final agencies by which it is exercised.

The juristic theory wholly rejects this logical schematism. It recognizes that the powers exercised by government vary with time and place, that the agencies in which government is organized are matters of historical circumstance and therefore from the point of view of logic largely accidental. There are no functions which are of necessity attributed to government, *semper, ubique et ab omnibus*. The study of political organization is therefore empirical throughout. This empirical study, however, is controlled by the intellectual necessity of assuming the unity of the subject of the study. The state, therefore, must beconceived as a unity, this unity being, as Jellinek says, "a form ofsynthesis necessarily imposed upon us by our consciousness."[1])

But this necessary unity does not require that authority shall be concentrated in any assignable person or organ; it points rather to a unity behind the empirical agencies of government. This is the state itself, a collective person, to which alone ultimate authority belongs and whose being consists solely in the fact that it is the repository of political and legal authority. The various agencies of government, including the crown or the representative assembly or the electorate, are merely organs through which the corporate personality of the

[1]) *Staatslehre*, Ed. 2, p. 163.

state expresses its will and performs its functions. As Laband puts it: "From the conception of the state as a juristic person in the eye of public law, it follows that the possessor of the state's authority is the state itself.... The personality of the state as the possessor of the sovereign rights of government disappears if the whole of these rights, the state's authority, be imputed not to the state, the organic community, but to the princes or the parliament or both together or any conceivable being other than the state itself." [1])

The theory of the juristic personality of the state solves the problem of locating sovereignty by cutting the Gordian knot. Sovereignty is identified with no agency of government. Government is fundamentally different from the state, since the former is a collection of functionaries while the latter is a hypothetical entity which embodies the political aspect of the community or nation. It will readily be seen that the substantial or personal aspect of sovereignty thus becomes highly rarified. The conception of sovereignty begins its career as the inherent attribute of the prince; the state is scarcely distinguishable from the monarch. Sovereignty is his necessary attribute; the monarch is the substance in which this attribute inheres. With the passing of the absolute monarchy the attribute is detached; it becomes a wandering adjective seeking a substantive to which it can attach itself. But all the discoverable substantives of modern government reject it, or fail to establish such a monopoly over it that real inherence can be shown. In the end there is no solution except to permit the adjective to set up as a substantive on its own account. Sovereignty inheres only in the state, and the state is merely a personification of sovereignty. The personality of the state is exhausted in the attribute, since the state-person has no reality except as a juristic or political entity.

As a matter of fact, however, the theory of juristic personality has somewhat more important philosophical bear-

[1]) *Staatsrecht des deutschen Reichs*, Ed. 4, Vol. I, p. 90. Quoted by Krabbe, *Rechtssouveränität*, pp. 111 f.

ings than is suggested by this criticism. Thus it should be noted that Jellinek does not regard sovereignty as the most important aspect of juristic personality. He finds the essence of juristic personality in the capacity which a collectivity may have of exercising a will of its own, distinguishable from the individual wills of its members. Such a collectivity becomes a possible subject of rights and obligations and is for this reason a juristic person. Accordingly he regards it as a matter of detail whether the collective will is supreme, i.e., sovereign. The essential characteristic of the state is not supremacy but the fact that its powers are self-derived or inherent in it as a collectivity, rather than delegated to it by some other juristic person. Thus he concludes that there are both sovereign and non-sovereign states. The members of the American federal union are states because they are juristic persons with inherent powers; they are not sovereign, however, since their powers, though not derived from the federal state, are exercised in subordination to the sovereign will of that state. In deference to the federal principle he thus gives up one of the traditional attributes of statehood; the power of the state is inherent and indivisible but not necessarily supreme. For Jellinek the state is the embodiment of inherence of power rather than of sovereignty. It is manifest that this theory, in attempting to meet the facts of federal statehood, runs the risk of proving too much. For there are in modern society a great number of collectivities which exercise a will of their own and which can scarcely be said to derive this capacity in all instances from the particular collectivity known as the state. We shall return to this point in a later section dealing with some recent theories of corporations and the bearing of these theories upon the theory of the state.

The juristic theory of the state, and particularly Jellinek's theory of the state as inherence of power, is mainly significant because it is symptomatic of a profound change in point of view which affected almost every department of social and ethical philosophy during the latter part of the nineteenth

century. The struggles of political scientists to identify sovereign authority with tangible persons or agencies were merely a phase of that individualism which prevailed throughout all the social sciences at an earlier date. Every social phenomenon had to be attached to specific persons simply because the presumptions of the social sciences left no other real being to which they could be attached. Social good was the summated happiness of discrete individuals. Obligation was "the necessity of doing or omitting anything in order to be happy." Social motives were the concealed egoism of individuals acting either from enlightened self-interest or deluded by an association of ideas into the belief that their happiness was identified with the happiness of others. The state and society were groups of individuals, each motived by the internal force of his own passions or will, and held together by relations of a generally contractual nature which could be justified only by the fact that they ministered to private happiness. Social relations were conceived to enter in no intimate way into the making of individual personality. From this point of view the law could be nothing except the will either of those individuals who were as a matter of fact powerful enough to impose their will upon others, or the will of individuals who had by consent received a contractual right to direct the conduct of others. So long as this conception prevailed, political theory could not abandon the effort to point out sovereign persons, unless it were prepared to admit its utter vagueness.

The case is different, however, if these presumptions of individualism are abandoned, as they were abandoned or fundamentally modified in the latter part of the nineteenth century. The Hegelian philosophy and among English speaking peoples its modern or Neo-Hegelian equivalent, the historical study of law and political institutions, the progress of biological science, and the rise of a more adequate social psychology all contributed to produce the consciousness of the social group as something more than a number of individuals inhabiting the same territory. Political science was affected by the same

trend of thought. The theory of natural rights and of the social contract were utterly swept away in the reaction which followed the French Revolution. The Utilitarian theory of *laissez faire*, which was fundamentally similar in its chief presumptions, suffered a negative criticism which destroyed its scientific pretensions, even before the tendency of public policy had obviously begun to follow another line. So-called "organismic" theories of the state and of law began to make their appearance and no doubt served a good purpose in their day, though the analogy of the state to an organism is at least as likely to mislead as to enlighten. If political science must use analogy, that between the state and a person is undoubtedly better, though it may well be hoped that we have at last reached a stage in which political society can be studied for what is is, a social or communal phenomenon, without the use of any analogy. It is sufficient for our purposes, however, to point out that the theory of juristic personality was the culmination of the socializing tendency in political theory, at least so far as that theory had gone by the end of the last century.

There was still another motive which contributed to the force of the theory of juristic personality. It seeks not only to avoid the difficulties of identifying the sovereign with particular persons or bodies, but also to emphasize the juristic nature of the state's authority. In other words, it carries forward the ideal which we have already noted in the theory of popular sovereignty, the ideal of an authority which is more than the expression of an arbitrary will. Thus among English political scientists, Mr. Ernest Barker has urged the personality of the state as a device for making the state itself legally responsible for the torts of its agents. [1]) The theory urges that the entire nature of the state's personality is juristic; it has no being aside from its relation to law. Its administrative acts may not be arbitrary commands but must be carried out within the system of law which the state itself prescribes and upholds. Hence the

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[1]) "The Rule of Law," *Political Quarterly*, No. 2, May, 1914, p. 117.

theory has emphasized what its German authors call the "legal state" (*Rechtsstaat*). Laband states the principle as follows: "The state can require no performance and impose no restraint, can command its subjects in nothing and forbid them in nothing, except on the basis of a legal prescription." [1]) Similarly Otto Mayer emphasizes the subordination of executive to legislative power. Hugo Preuss in particular stresses the legal nature of the state's authority. Following Rosin he defines rulership (*Herrschaft*) as the "legal subordination or superordination of personalities." [2]) The will of the collective personality is *legally* superior to that of its members. The relation between the state and its members is a legal relation; the state has duties toward them and they have rights as against the state. "If the view of the state as a personality, that is, as a juristic entity, be made the basis of the entire theoretical explanation of the state, it becomes impossible to separate the state from law even in thought." [3]) Nothing can be more explicit than Preuss' rejection of anything like an arbitrary creative power of the state over law. "When the state makes law at the present time, it merely makes explicit the force which resides in the notion of right; it declares latent law and does not make law out of nothing." [4]) But in fact Preuss is not perfectly consistent in holding to the proposition that the relation of the state to its members is a legal relation, though he asserts that this proposition is the essential principle of the legal state. Upon occasion he falls back upon a natural subordination of parts to the organic whole, which leaves it an open question whether the rule of the state is necesarily the rule of law. The fact is that the theory of juristic personality, though it makes the authority of the state less strictly personal than any of the preceding theories of sovereignty, is not able to arrive fully at the ideal

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[1]) *Staatsrecht des deutschen Reichs*, Ed. 4, Vol. II, p. 173.
[2]) *Gemeinde, Staat, Reich als Gebietskörperschaften*, p. 180; Cf. Krabbe, *Rechtssouveränität*, pp. 114 ff.
[3]) *Op. cit.*, p. 202.
[4]) *Op. cit.*, p. 206

of a state which is lawful through and through. Wherever sovereignty is asserted, — even the sovereignty of a hypothetical person who has no function save to declare law, — the argument is open to the construction that law is made by virtue of its declaration. State and law are identical, as Preuss argues. But is this because the state declares latent law or because what the state declares is explicit law? The latter view is obviously one which the theory of juristic personality wishes to avoid. But on the other hand, if the law is already real, though latent, wherein is the supreme importance of the sovereign state as the mere declarer of law? Or to state the difficulty otherwise, if the relation between the state and the individual is only that of part and whole, analogous to that between an organism and its members, what guarantee is there that the relation is a legal one or that control will express itself through rules of law? This difficulty goes to the root of the conception of sovereignty itself. A sovereign can mean nothing except a being who is inherently authoritative and whose will has the right to rule simply because it is his will. Logically this fact cannot be altered by the further fact that the sovereign being is a corporate person. But if the law is authoritative because it issues from an inherently authoritative person, the assertion that the person utters only law is nothing but an identical proposition. Law is the will of the sovereign and the will of the sovereign is law, as Hobbes long since asserted. But this is assuredly not what the theory of juristic personality means to assert. Its whole point is that in the modern state law is not a fiat of will but a rule of right.

The same unclearness regarding first principles reappears in the final statement of the theory of juristic personality by Jellinek. The state by definition possesses for him an "inherent, original, underived power to enforce its own will against other wills." Nevertheless he attempts to justify the right of the state to use compulsion as necessary in the interest of law. Indeed he insists that the two questions coincide; the basis of the state's authority and the basis of the law's authority are

essentially one. But this argument is manifestly circular. The underived authority of the state is made to serve as the basis of the force used in behalf of law, while at the same time it is justified as necessary to uphold the law. The right to exercise authority must be assumed somewhere. If it really inheres in the state, there is no reason to justify it by appealing to law. On the other hand, if the law itself is authoritative, there is no need to assume an ultimate authority belonging to the state, for the authority exercised by the state must come from law.

It is at this point that the problem of political theory is attacked by Professor Krabbe in his earlier work, *Die Lehre der Rechtssouveränität.* Throughout the entire history of the theory of sovereignty, including its latest statement by the school of juristic personality, Professor Krabbe finds a dualism of first principles. On the one hand, the authority of the state is accepted as a first principle. The dominion of the state over its subjects is asserted to be inherent in its own essential nature and hence its right to rule is held to be axiomatic. No reason for this right can or need be sought, since authority belongs to the state by definition. It is a simple deduction from this principle that law is the will of the state expressed through organs which the state itself creates for this purpose. A political theory developed consistently from this point of view would at least possess unity and in fact such theories have existed in the past. But even at the height of monarchical absolutism such a theory did not fully fit the facts for, as we have seen, the ruler did not in fact possess the power to alter the common, private law at will. In modern times the trend of the constitutional state has been steadily against the exercise of an arbitrary free will such as the theory of sovereignty implies. The so-called organs of the state, — the various classes of officials and branches of government, — came more and more to owe their competence to law. They came to be designated in ways prescribed by law; the powers they exercise came to be defined by law, and they themselves came to be responsible under the law for their acts. Political thinkers, including those who framed the juristic the-

ory of the state, were aware of this tendency in affairs and were alive to the desirability of legalizing official action. Accordingly they tended more and more to take the ground that the state itself is bound by law; it could manifest its will only through law, by making law or by action in accordance with law. This view, however, raises the law itself to the position of a first principle for political science. The state is obliged to rule by law, though it had been assumed that the law is binding because it is the expression of the inherently authoritative will of the state. The state creates law but its organs are the creatures and servants of law. The contradiction is patent and insoluble, so long as both positions are maintained. The theory of juristic personality pushes the element of personal authority as far into the background as possible, but it cannot entirely escape from this implication of the theory of sovereignty. If the authority of law and that of the state coincide, as Jellinek for example holds, the only reasonable position is to assume that law is naturally authoritative because of its ethical character as embodying a rule of right. From this point of view the state itself is the creature of law. Its various organs are brought into being by law; they exercise powers defined by law; and the authority thus exercised is an authority conferred upon these organs by the law. This is the position taken by Professor Krabbe and called by him the "theory of the sovereignty of law."

IV. THE PERSONALITY OF CORPORATIONS

By another path other scholars have been led to conclusions remarkably similar to those of Professor Krabbe. In fact, the theory of juristic personality proved to be a two-edged sword. Designed by its authors to remove the difficulties of the state-organ theories of sovereignty, it contained the germs of a point of view which threatens the theory of sovereignty itself. As we have already seen in the case of Jellinek, the emphasis of the theory falls upon the corporate or organic conception of the state and upon what might be called the "natural" subordina-

tion of the parts to the whole, with only a minor emphasis upon the supremacy of the collective person. The essence of the argument is that some degree of authority inheres by nature in the collective person and that this inherent power makes it a state. The argument assumes that the state is unique in this respect; legal authority resides ultimately in it and in no other kind of collectivity or corporate body. Unless the state is a corporate body *sui generis*, the whole defense of sovereignty by the theory of juristic personality is in vain. This assumption has been challenged with so great a mass of evidence and by authorities so weighty that the challenge constitutes a difficulty of the first order for the theory of sovereignty.

The issue was raised by the exhaustive discussion of the legal theory of corporations in Professor Otto Gierke's *Deutsches Genossenschaftsrecht* (1868—81). This work pretty thoroughly demolished the traditional theory that corporations are *personae fictae*, which possess a corporate self-identity only in so far as personality is conceded to them by the state. Professor Gierke showed that this theory was the product of glossators and canonists working upon the rather meager texts of the Digest. It was first clearly formulated by Innocent IV, who became Pope in 1243 and who utilized it in the conflict between the Church and the Empire. The large number of cathedral chapters and religious orders made it necessary that their status should be settled in order that their rights might be protected and their relation to the Church made clear. Such bodies were to be called persons but their personality was fictitious; it was a *nomen juris*. Besides men, or natural persons, the law recognized as subjects of proprietary rights certain fictitious, artificial, or juristic persons.

This doctrine, however, ran counter to a rich development of Germanic corporate life and Italianized Roman law was not dominant in Germany. The "open air, oral tradition of the unacademic doomsman" survived long after the Roman law was being taught in the universities of Oxford and Cambridge. The Reception of the Roman law in the fifteenth century,

however, resulted in the general acceptance of the concession theory of corporate personality. In spite of its incompatibility with certain facts of corporate self-sufficiency, it remained the accepted theory of corporations until the latter part of the nineteenth century, not only upon the Continent but also in England. Only with the rise of the Germanist School under Eichhorn and Grimm was it seriously questioned. In combatting Savigny's "Roman theory" Georg Beseler, one of the leaders of the Germanist movement, asserted, "You will never force our German fellowships (*Genossenschaften*) into the Roman scheme; we Germans have had and still have other thoughts than yours." [1]) It was Gierke, however, who first clearly showed the historical origins of the theory and proved its insufficiency.

Western society has always been characterized by a multitude of groups, existing for all imaginable purposes, sometimes with and sometimes without the explicit recognition of the state, but in their entirety constituting the great mass of social relations between individuals. In point of bulk such relations have always filled a much larger place in individual life than those implied directly by citizenship in the modern state. Citizenship, because of the size of the modern state, was necessarily a somewhat generalized and impersonal relation, even though it might be backed by powerful sentiments. Effective social relations were largely in groups other than the state. Moreover, it is obvious to any careful student of society that the number and importance of such groups have increased enormously within the last fifty years. The growth of federal government, which proved to be the only practicable method of forming political organizations on the scale demanded by modern industrial and commercial relationships, is itself a proof of the vitality of the local group. The rapidly increasing size of cities is an outstanding social phenomenon, but mere increase in size is less significant than the greatly increased

[1]) Gierke, *Political Theories of the Middle Age*, English translation and Introduction by F. W. Maitland, p. XVIII.

importance of their functions, the enlarged scope of their powers, and the independence of their authority which size has brought with it. Still more typical of the present day is the vast and growing number of associations for economic and social purposes which are not local in their character. Units of capital and of industrial management have grown not only in size but in the effectiveness of their co-operation; they have extended their organization not only through the length and breadth of single states but also across the national boundaries. Organizations of labor have been forced into a parallel extension in order that they might develop the strength to cope with organizations of employers. Nor are these modern associations invariably economic in purpose. They exist for the most diverse aims and on widely different scales. Their fundamental condition is a consciousness of common interest; where such a consciousness exists an association can arise which is limited only by the breadth of the interest and the degree of loyalty it can evoke. Associations of this sort have always existed but at the present moment their enormous extension is a social fact in our European and American civilization of first rate importance.

Now collective or corporate units such as these are certainly not mere numbers of individuals standing in quasi-contractual relations to one another. The group itself has ends which it pursues with more or less consistency; it has a settled policy which no individual can modify at will. Its collective character is as fixed as the character of an individual. It can assert collective rights and assume collective obligations. In short, it has the same type of energy and inertia which in the individual we call will or personality. Such groups are real juristic persons, competent to possess legal rights and to perform legal acts. Moreover, the granting of a franchise by the state neither creates nor fundamentally alters the essential nature of these collective persons. Whether they happen to be organized as corporations within the restricted and rather artificial legal meaning of the term, or whether they prefer to hold their property un-

der a trusteeship, or to organize themselves as business partnerships, is a legal technicality which has little bearing upon their real character. Their effectiveness depends upon the social bonds that unite their members and upon the need of human nature for a group-life such as they afford. The state cannot make them; it cannot always destroy them. It may recognize them, but in so doing it merely recognizes something which exists as a fact and which is in no sense produced by recognition.

The significance of this theory for political science first becomes apparent when it is placed side by side with the corporate or juristic theory of the state. The point was first brought clearly to the attention of English and American students by Professor F. W. Maitland in his translation of a portion of Gierke's work which he published in 1900 under the title, *Political Theories of the Middle Age.* Professor Maitland's Introduction to this little volume has been the basis of a widespread discussion of sovereignty which marks a new tendency in political theory. The pregnant suggestion in this modern theory of corporations is the conception that the state itself is merely one form of collective personality. As Maitland says, "There seems to be a genus of which State and Corporation are species. They seem to be permanently organized groups of men; they seem to be group units; we seem to attribute acts and intents, rights and wrongs to these groups, to these units." [1] The principle of the personality of the state, therefore, is fully recognized, but it is urged that this is no unique quality of the state. It is a natural quality of every human association which is held together by an enduring social bond. There is no single corporate person, the state, from which all other human associations are derived. There are multitudes of them, varying in the closeness of their organization, the extent of their control over their members, the permanence of their duration, and the importance of the ends served. Every individual is in fact a member of many such groups, which may exist side by side almost

[1] *Op. cit.*, p. IX.

without relation or which may on occasion become competitors for the individual's loyalty. The problems both of morality and of law are largely problems of adjusting the conflicting claims and interests of such associations. The theory acts as a solvent upon the doctrine of sovereignty because it is difficult to perceive why the claims of the state, as one corporate body among others, must inevitably be superior to those of all other bodies.

This aspect of the new theory has been most emphasized by Professor John Neville Figgis in his *Churches in the Modern State* (1913) and by Mr. Harold J. Laski in his two volumes, *The Problem of Sovereignty* (1917) and *Authority in the Modern State* (1919). The former urges the right of churches to an autonomous existence; the latter extends the same right to economic groups such as the organized personnel of an industry. Such associations have a corporate personality independent of the state. They are one in kind with the state itself and like the state their existence is justified by the fact that they minister to unescapable human needs. It is an easy step to the conclusion that they possess rights which the state must not invade and which the state cannot take away.

It would be an utter misconstruction to suppose that this is merely a new form of the old argument for toleration and that accordingly the claim made is merely to a moral right of self-determination. Nor is the argument intended to be a reformulation of the theory of natural rights, the rights in this case of a group-personality rather than of an individual. The argument assumes the abandonment of sovereignty by the state, the claim, that is, to a monopoly of inherent authority, to complete legal independence of all external control, and to complete legal supremacy over all internal affairs. The rights of corporate persons, even as against the state, are conceived to be legal rights. To say that a corporation is a juristic person means that its personality as a subject of rights and obligations is recognized by law. In this respect also the state is like other associations. It too is a juristic person because of its rec-

ognition by law and its competence arises from this source. The state, therefore, is not antecedent to the law but like other corporate persons is dependent upon it. Thus the theory of the real personality of corporations joins hands with the conclusion at which Professor Krabbe arrived by another path, the conclusion that the state derives its rightful authority from the law. This point is of fundamental importance and must be considered further.

V. THE STATE AND LAW

It is worth while at the outset to clear away a possible misconstruction of this assertion that the state is bound by law. On its face the assertion may be made to look like a contradiction in terms. Whatever it is that makes law, — call it the sovereign or what you will, — cannot be limited by law in its making of law. This proposition cannot be denied because it is in fact a truism. It has been given altogether more attention by writers on sovereignty than it is worth. For so far as the relation between law and the state is concerned, it settles nothing whatever. It tells us nothing about the sources of law, its binding force, or the extent to which it can or ought to control the acts of governing agencies. It is consistent with any theory whatever regarding these matters. The problem concerns the rationale of political authority and this problem cannot be solved by a truism.

On the other hand, the proposition that law is the will of an inherently authoritative sovereign, which sometimes takes refuge behind the truism mentioned above, is in fact quite a different matter. It asserts that the law derives its binding force from an extra-legal will. Starting from this point of view the German attempts to reach a fully legalized state ultimately fall back upon the device of self-determination. The sovereign will imposes upon itself the obligation to act through rules of law and in conformity with established law. But as has often been pointed out, self-determination is no determination at all. It is an undoubted fact, as we have seen, and a fact of great im-

portance, that modern governments have shown a tendency to regulate their actions more and more by rules of law and to limit more and more the merely arbitrary will of rulers. But from no point of view is it an explanation of this fact to appeal to the self-limitation of the state. Such an explanation merely repeats the fact; it offers the fact itself as its own explanation. For if the law itself is the will of the state, there is no assignable reason why that will should express itself in law or conformably to law and in no other way.

The fact is that this question cannot be discussed without going deeper. The real issue is whether the state can be adequately conceived as a sovereign will and whether law can be adequately conceived as an expression of will. The proposition that the law receives its binding force from a sovereign will must be judged as representing a certain conception of law. From this point of view the law is a command, an order issuing from one will and addressed to another will. The emphasis of the theory is exclusively upon one aspect of law, its imperative nature as a rule for the curbing of subordinate wills. Moreover behind this view of law there lies a conception of society. Society is pictured as a collection of wills each seeking its own ends and requiring to be brought into harmony with other wills by supervision and direction. The theory of sovereignty says nothing about the content of the command. The only question is whether it issues from a proper source; an imperative arising from an authoritative source *is* law. The only question concerns the means by which a given will can be designated as authoritative. Accordingly theories of sovereignty differ only with reference to the method of determining the source from which imperatives may rightfully issue. Or to state the question somewhat differently, if law is the will of the state, how is the state given the right to express its will in commands binding upon its subjects?

We may leave out of account theological theories of sovereignty which sought a supernatural ground for authority, though they have played a great part in the past. Perhaps the classical

theory, or at any rate the classical liberal theory, is the doctrine of government by consent, which was stated most explicitly in the various forms of contract theory. It should be observed that this theory, though universally rejected by political scientists. is really implicit in the doctrine of popular sovereignty which is still prevalent. The assertion that the people rule, that government is self-government, means, when it is used to justify the coercive exercise of authority, essentially the same thing as government by consent. However veiled, this amounts to the theory of a social contract. And like the contract theory, the doctrine of consent is a pure fiction. It is at most an awkward way of insisting that authority should not be arbitrary but in practice it does not even offer a way of determining what exercise of authority is arbitrary. As John Stuart Mill and other liberal thinkers of the mid-nineteenth century were aware, the doctrine of consent, as commonly interpreted, might be consistent with the most serious invasion of the rights of minorities. The truth is that the doctrine of consent attempts the impossible. It seeks to conceive all political obligation as freely accepted and therefore as something to which the individual binds himself by his own act. It requires no argument today to show that this is a wholly inadequate way of conceiving political and social relations.

It should be noted, however, that the theory of consent adopts the only way open to it in view of the presumption regarding the nature of law and society with which it works. This presumption, it should be observed, is precisely the same as that which we have already pointed out as typical of the theory of sovereignty. Society is conceived as a collection of wills and law as a body of rules for curbing the will. In default of some supernatural guarantee for the superiority of the sovereign will, some such guarantee, for example, as was offered by the theory of the divine right of the king, how can the right of one will to control another will be justified except by consent? The theory cannot appeal to the value attaching to the content of the rule, for as we have seen, the theory of sovereign-

ty neglects the content of rules. They are authoritative if they issue from an authoritative source. But fundamentally there is nothing in the nature of will which can justify the right of one will to control others. Except on the assumption that each will freely accepts the burden, there is no way to free such control form the stigma of arbitrariness.

The theory of sovereignty and the theory of consent thus form two sides of a single conception of law and society. There is, it is true, an apparent opposition between them, since the one insists upon the absolute authority of the state and the other upon the indefeasible rights of the individual. This is what Professor Burgess refers to as the paradox of liberty and sovereignty. But the opposition is more apparent than real, in the sense that both adopt essentially the same point of view. The theory of sovereignty insists that wills must be controlled. The doctrine of consent urges that nevertheless they must remain wills. An assertion of personal liberty is the correlate of the assertion of a supreme right to command. The principle of personal liberty, at least in its traditional forms, meant that there was a residuum of decisions which must be left to the individual will, else it could not retain the dignity due to human personality. From this point of view the ideal of law becomes that stated by Kant, the maintenance of a system which permits the widest possible assertion of the free rational will.[1]) Such a will, though controlled internally by its own rationality, is free externally in so far as it has an unrestricted liberty to do as it pleases. Freedom consists not in the content or worth of that which is done but merely in the formal fact of unrestrained determination by the will itself, or, as has been said, in "a sphere of anarchy." Every person is to be guaranteed a certain circle within which he may move at will. The state will maintain his boundaries against aggression but the content of the decisions taken within the limit set is solely the business of the in-

[1]) On the prevalence of this point of view in nineteenth century jurisprudence, see Roscoe Pound, "The End of Law as Developed in Juristic Thought," 27 *Harvard Law Review*, p. 605; 30 *Ibid.*, p. 201. Cf. also "The End of Law as Developed in Legal Rules and Doctrines," 27 *Ibid.*, p. 195.

dividual. The state does not profess to maintain even the conditions of any kind or degree of concrete accomplishment. The individual is the sole arbiter of the kinds of satisfaction he shall seek; the risk is his and also the profit. The state is responsible solely for preserving the limits within which the individual is free and in the performance of this task the will of the state is as absolute as that of the individual within his own sphere. The rights of the individual and the authority of the state are related as the inside and the outside of the same circle. In practice this view issues in an emphasis of the rights of contract and property.

It is idle to discuss the assumption of a sovereign will or the principle of personal liberty and government by consent, so long as the presumption regarding society and law implicit in those theories is unquestioned. Assuming that society is a collection of wills each motived by its own internal force, there is no principle of harmony except an overmastering force, as Hobbes very clearly saw. Assuming that this coercive force is to be justified to the individual will, it can be justified only on the assumption that he accepts its control. From this point of view, therefore, the theories of a sovereign will and of consent are inevitable. The fact that both are fictions merely reflects the inadequacy of the general view of society and law upon which they rest. Like all broad generalizations this view is not so much untrue as one-sided. It develops a theory of political obligation about a single phase of society and a single function of law. Its history has been one of gradual decay as other aspects of the subject were brought to light in political theory. At the same time, the trend of political evolution itself has been such that the ideal of individual liberty or the assertion of rights became less and less a guide for legislation.

Already within the limits of the contract theory itself we can see in Rousseau's distinction between the general will and the will of all the breaking-up of the view which regards the political community as merely a collection of wills. The general will is a will only in name; it belongs really to a different order

from the individual will. This point is carried further in the so-called "organismic" theories of the state and still further in the theory that the state is a corporate personality. In this type of theory the control of the individual is justified not by his consent but by the inherent superiority of the whole to the part. The individual belongs to the social system and his achievement of moral dignity depends upon his finding a place in it. His personality as an individual is largely the product of his loyalty to causes larger than himself. He is not naturally and inherently a subject of rights but by attaining a station in the social whole he becomes the subject both of rights and duties. Rights and duties are therefore reciprocal and in a twofold sense. Rights require social acceptance; no man has rights by nature or merely because he claims them, but only because his claim gains the recognition of others besides himself. One man's right implies another man's duty. But rights and duties are reciprocal also in the sense that both imply a certain social responsibility in the character of him who possesses them. The moral capacity to fill a recognized place in society and to accept the responsibilities of that place is required to make one the subject of either rights or duties, and rights cannot be withheld if duties are to be exacted. All that the individual has, both of rights and duties, is social in its nature. He cannot escape, and in the end cannot wish to escape, from the net of social relationships within which he lives his personal life. Authority is not outside him but is one of the conditions of his own personality.

This explanation of authority, which largely gained currency from the Hegelian and Neo-Hegelian philosophy, [1]) brings to light a new and fundamentally different conception of political society. Society is no longer a collection of wills but a system of co-operating parts or organs. Sovereignty, therefore, is the property of the whole. No part is as such endowed with the

[1]) The best presentation is probably B. Bosanquet's *Philosophical Theory of the State*, Ch. VI. Cf. also F. H. Bradley, *Ethical Studies*, Essay V, "My Station and its Duties."

right to command, but since the significance and value of the individual depends upon his relation to the whole, this whole has a superior value which the individual recognizes as the principle for evaluating his own ends and actions. In the last resort, therefore, the will is not curbed by other wills. The control of individual caprice and wilfulness, which is inseparable from social life, is an indispensable means to the attainment of that wholeness of vision which the development even of individual personality demands.

The theory thus briefly summarized is important because it affords a point of view which is indispensable to any theory of political obligation. It once for all breaks down the hard impenetrability of human personality as conceived by the older theories of individualism. It is in effect a return to the Aristotelian principle that man is by nature an animal which lives in a political community. His social connections are not accidental to him but part of the warp and woof of his own personality. This conception, or some equivalent for it, makes part of the point of view from which any theory must consider the question of political authority. At the same time the theory is too general in its scope to give us more than a point of view. In the first place, it deals rather with the whole of society than with the state specifically. It arrives too easily at the state as the all-controlling social group. Granted that social relations are inseparable from even the individual good, why should it be just the state which is the ultimately authoritative group and the arbiter of all other groupings? The theory does not meet the questions raised by Professor Figgis and Mr. Laski and it may be conjectured that it relies too completely upon Greek experience. The modern national state is no fair analogue of the Greek city state, which dominated not only political relations but also the citizens' religious and moral experience in a way that no modern state can do. In the second place it is to be noted that this theory does not address itself especially to the conception of law. It does not question the proposition that the chief characteristic of law is its imperative or coercive quality.

Accordingly, as Professor Bosanquet says, "The State.... is necessarily force." [1]) It offers, to be sure, a new type of justification for coercion but the justification still runs in terms of will, though the theory recognizes that will is no such simple matter as the older theories had been accustomed to assume. The distinction between "real will" and "actual will" [2]) involves aspects of the nature of law which cannot be adequately dealt with by the conception of it as the expression of a superior will.

A third class of theories regarding the authority of the state is made up of those which appeal yet more directly to social organization. Of the various forms which these theories take, certain aspects of the views of Professor Léon Duguit will serve as an illustration. This type of theory refers the rightful authority of rulers to the sociological principles which govern the structure of human society. Starting from Durkheim's principle of the division of social labor, Professor Duguit posits social solidarity as constituting an objective law binding upon all the members of a society. [3]) This objective law requires that everything shall be done which increases solidarity and that everything shall be avoided which decreases it. By this means the author arrives at the conclusion that the state is bound by law, since those who rule are subject to the objective law like all other members of the group. There is for him no state as distinguished from the persons who actually wield political power. Indeed, such power is merely a fact; there is no justification of it, though it is rightly used when it promotes the end of solidarity. According to this view, then, human needs give rise to certain permanent institutions which must be maintained in order that the needs may be satisfied. This objective social structure requires certain kinds of behavior and outlaws certain other kinds. Certain services must be continuously rendered in order that the life of the group may proceed unbroken.

[1]) *Op. cit.*, p. 152.

[2]) Bosanquet, op. cit., Ch. V.

[3]) *L'état: le droit objectif et la loi positive*, Sect. 182 ff. Translated in *Modern French Legal Philosophy*, pp. 258 ff

In so far as the rulers render these services, — and an increasing number of services in modern society are necessarily being placed under the control of government, — the obligations of objective law fall as stringently upon government as upon private persons. All are subject to the law which requires the preservation of the social structure. Law as it is commonly understood, — the statutes of the legislature, the decisions of the courts, and the ordinances of administrative officials, — is merely an expression of the objective law and gets its authority from this fact.

When we inquire how far this theory solves the problem of a state which is legal throughout, we perceive that it presents a sort of paradox. This paradox lies in the fact that, though the positive law derives its binding force from the fact that it is a means of solidarity, the author refuses to accept this as a justification of the authority exercised by the ruling class. The rulers exercise an actual power, due to their intellectual, moral, numerical, or economic superiority; in all societies some have been able, for these reasons or for others, to impose their will upon other persons. This is merely a fact; it has always been true and always will be true. But surely this misses the main point, namely, that power in the modern state is for the most part legal power. Those who wield it are designated in ways prescribed by law and their powers are defined by law. Even Professor Duguit himself elsewhere puts much stress upon the legal responsibility of officials for the performance of their duties and upon safeguarding the private citizen from arbitrary and extra-legal interference. [1]) But if the requirements of law are rightful as ways of preserving solidarity, it is hard to see how the power of officials under these laws can be merely the expression of extra-legal forces. This paradox really brings out the difficulty of the sociological type of theory. It leaves a gap between the objective law of solidarity and the positive law as it exists in our statutes and in the convictions of men about right and wrong, or lawful and unlawful, conduct. At

[1]) *Law in the Modern State*, Ch. II. English translation by F. and H. Laski.

all events nothing can be more obvious than that the making and administering of law is only partly motived by the consciousness of social solidarity as an end. Solidarity is a sociological generalization, embodying a fact about social groups and the general tendency of the institutions and laws which they develop. But there is a long step from this fact to the embodying of the fact in actual law and actual institutions. In consequence the theory fails to arrive at the end sought, an explanation of the fact that the modern state is legalized not in terms of a sociological principle but in terms of positive law. In order to see how this is possible, we must examine more closely the concept of law itself.

VI. INTERESTS AS THE SUBJECT MATTER OF LAW

The sociological aspect of Professor Duguit's theory does not in fact represent his most important contribution to the conception of law and the analysis of its authority. His main service is in bringing to light a phase of law which is too much neglected by the theories of sovereignty. The function of law, according to Professor Duguit, is to organize and keep in continuous operation a group of public services which are necessary to the life of society and which could not be carried on with equal efficiency without public authority. He makes a corresponding change in the aspect of government which is singled out for emphasis. Government is not a collection of powers, as it is necessarily conceived to be so long as the imperative phase of law is uppermost, but a collection of agencies to organize and manage public interests. Education, for example is such an interest. Under modern conditions public education has become for the most part a function of government. A system of schools has to be kept in operation, providing for education of all kinds from the kindergarten to the university. An adequate personnel of teachers and executives must be recruited; buildings and equipment must be provided; funds must be raised; the policy of the whole system, its curriculum, and its articulation with the industrial, social, and intellectual

life of the group must be planned. The purpose of educational legislation is to create and direct such a system. In the same way a great portion of modern legislation creates other similar public services. The railway system must be kept functioning, under private ownership perhaps but certainly not without public control and with whatever guarantees of credit and labor policy may be needed to keep it in a reasonable state of efficiency. The banking system must be supervised; highways and bridges must be built and kept open; sanitary regulations must be enforced and the public health safe-guarded; factories must be inspected and labor legislation administered; municipal water, gas, and light plants must be kept running. The list might be extended to almost any length, for no phenomenon of modern government is more conspicuous than the extent to which government has been forced to turn its hand to all sorts of social and economic problems. Professor Duguit's greatest service to political theory lies in the clearness with which he displays the effect of these new problems upon the organization of government.

It is obvious that in legislation directed to ends such as these, — and a great and growing proportion of law deals with just such questions, — the coercive or imperative phase of the state's activity is not uppermost. Coercion, to be sure, may be there. A school law is coercive in that it may involve taxation and it is certainly mandatory upon officials and perhaps to some extent upon parents or upon pupils in public schools. But this is not its sole nor even its outstanding feature. Some public services indeed involve no coercion at all; a city may produce electricity without requiring anyone to buy it. From this point of view, law is an expression of public policy, a decision with reference to the socially desirable course to pursue. It provides for widely felt needs both of a public and a private nature. The educational system aims to satisfy both the need of the individual for instruction and also the social need for an educated citizenship. From both points of view instruction is indispensable and the educational system is a public agency

designed to perform this service. Coercion is an incident, — no doubt in some respects an unescapable incident, but still only an incident, — in the rendering of this service. The exclusive emphasis upon the imperative nature of law is due to the fact that criminal law is frequently taken as the type. As a result, government is conceived as sovereign authority because police duties, the function of preserving peace and order, are thought to be the typical duties of government. The most novel and enlightening feature of Professor Duguit's theory is the idea that the rendering of public services is the type. From this point of view the suppression of crime and the preservation of public order and peaceful relations are themselves public services. They are services more elementary in their nature than the care for education or railway transportation but under modern conditions not more indispensable.

Behind this view of the state as a collection of public services there lies a far-reaching change in the conception of law itself. The end of law can no longer be conceived as principally the maintenance of rights. The foundation of this point of view is, as we have seen, the conception of society as a collection of wills each of which is to be defended in the exercise of the largest possible measure of free decision. From the other point of view society is a system in which the paths for certain exchanges of service must be constantly kept open, and the law is the means by which this is accomplished. There are interests which must be served. Within such a society the individual is a subject of interests rather than a subject of rights. Indeed his rights are only one species of interests, those namely to which law gives protection and sanction. Ihering's definition of rights as legally protected interests [1]) is commonly admitted to mark a change in point of view which is of fundamental importance. [2]) It is important to see precisely what the change in

[1]) *Geist des römischen Rechts*, Sect. 60, Ed. 4, Part III, p. 339.

[2]) Cf. Roscoe Pound, "The End of Law as Developed in Legal Rules and Doctrines," 27 *Harvard Law Rev.*, p. 226. "Such a movement is taking place palpably in the law of all countries to-day. Its watchword is satisfaction of human wants, and it seems to put as the end of law the satisfaction of as many human demands as we can with the east sacrifice of other demands."

point of view amounts to in order to grasp its bearing upon theories of the nature of law.

The idea behind the concept of an interest is that of participation in some property or benefit or advantage, that is, in some value whether tangible or otherwise. In this sense we speak of an interest in a business or an estate. On the other hand, the word has a subjective meaning as referring to the state of mind with which one regards or concerns oneself with the value in which one claims to share. Thus one is said to be interested in a business, meaning not only that one actually owns a share of it but also that one concerns oneself with it or feels it to be a matter of importance. This use of the word receives in common usage a very broad application. Interests refer not only to shares in the ownership of tangible things or things capable of a monetary valuation but also to quite intangible things where no question of ownership is involved. Thus one is said to be interested in political issues or in literature or in sport. In all these cases, however, there is the same fundamental idea. The thing in question calls out a peculiar sort of mental attitude in the mind of the person interested; it has a bearing upon his action or judgment, and he has a share in it in the sense that it is a matter of at least potential value for him. He concerns himself about it. It attracts him or possibly repels him; at any rate it is not indifferent but evokes some sort of reaction either in his actions or at all events in his thoughts. The meaning of an interest will thus be seen to be twofold. There is always the sharer and the shared. There is the private or subjective side, the fact that a response of some sort is elicited, and the external or objective side, the fact that there is always something other than the interest itself toward which the feeling is directed. It is this twofold nature which makes the conception of interest serviceable in an understanding of the society in which law exists and functions.

It will readily be seen, therefore, that the conception of an interest is well designed to break down the exclusive character which attached historically to the conception of a right. A

right seems to belong strictly and solely to the person who possesses it and to imply the exclusion of others from that which lies within its scope. An interest, on the other hand, is a share and it carries with it the suggestion of other sharers. There is no limit to the number who may share. Such a share may of course be a separable part of some property or value, but there is no need that it should be. The value shared may be such that it can be shared by an indefinite number without any single interest or share being the smaller or less valuable on that account. An interest need not be diminished because other persons have a similar interest. The conception of interest thus breaks down the particularist implication that belonged historically, if not necessarily, to the conception of rights. It passes at once beyond the notion of a good conceived as a possession or a piece of property which can be enjoyed by one person only on condition that others are excluded from it. It suggests what is obviously a fact, that many interests can be shared indefinitely. And the acceptance of this fact removes one great obstacle to the recognition of classes of interests less tangible than those of property. The right of a laborer to a living wage is a notion so vague that neither the courts nor the legislature can successfully safeguard it. The interest of the whole community in preserving a certain minimum standard of living for all its members is an idea that can be easily grasped, however hard to realize it may be in practice. The whole change of emphasis from property rights to what are sometimes called "human rights" is in fact a recognition that the end of law is the safeguarding of interests.

In another way also the conception of interests tends to free thought from particularist implications. A right is the attribute of a person, but an interest may be larger and more permanent than the person who possesses it. The conception of a right is subjective; that of an interest, as we have pointed out, is always on one side objective. It permits the individual to become a sharer in something which transcends his personal particularity. No doubt men feel an interest, but an interest is not

merely a feeling. For an interest is a share; it cannot be exhausted in the mere fact that it is felt. There must be something objective to which the feeling can attach itself. An interest in some corporate group, like a political party or a church, means the acceptance of the purpose of the group as part of one's own purposes. The group, therefore, represents a lasting and an objective interest of which the individual makes himself for the time being part-possessor. The concept of interest serves better than any other the end of escaping from the barren subjectivism which pictures the person as self-contained, a purely private self shut up in his own feelings and aiming at his own well-being. A person who is conceived as a subject of interests is necessarily in touch with his surroundings. He participates in what is going on around him precisely because his interests necessarily take him out of himself. For the same reason the end of preserving interests lays upon law an obligation which cannot be met by preserving merely certain forms of social relationships, such as liberty of contract. Interests are the very stuff out of which human beings are made. The satisfaction of an interest is always a matter of positive achievment, to be judged by its actual effects upon the ends and accomplishments of concrete human beings. Action may have the form of free will and yet the conditions may be such that no end worth achieving is possible. In such a case the interests are in no way preserved by the fact that there is formal liberty. The view that the state must maintain at least the conditions of a minimum of valuable achievment is another example of the shift of emphasis from rights to interests.

It is also an advantage of the concept of interests that it does not make the individual merely a part or function of some social whole. It avoids the difficulties both of the analogy between society and an organism, and that between society and a superior personality. The latter theories are and must remain analogies and analogies are dangerous. The theories of a social organism or of a corporate person cannot take the place of a direct examination of social fact or the statement of

such fact in categories suitable to its own peculiar nature. The concept of interest has precisely this value. A social group is not an organism for the obvious reason that the members of it are not organs. It is not a person for the equally obvious reason that a person is not made up of other persons. The members of a human society are persons and they are never anything else. And being persons, they are drawn to the group precisely because it gives them something indispensable which they can share or be interested in. In the long run the power of the group must rest on its capacity to evoke loyalty in its members. If on the one hand interests take the individual out of himself, they always make him a sharer in something which has an importance for him. Sharing is necessarily two-sided; the share belongs to some one though it is a share of something outside its possessor. This relation of the person to the group is *sui generis*. It is a clear fact of every-day knowledge and nothing but confusion follows from the attempt to force it into the categories of another order of facts. The fact itself presents no paradox unless such an attempt is made.

Acceptance of the view that the law aims to safeguard interests largely does away with the discussion of such idle questions as whether legislation is "socialistic" or "individualistic," or is directed to the good of the group or of the individual. Obviously no theory alters the fact that some interests conflict with other interests; the important point is to sacrifice as few interests of any sort as possible and if some must be sacrificed, to choose the less important. But nothing can be more obvious than that, in the large, all interests are both social and individual. The old debate about the relative importance of self-interest and altruism in human nature is hopelessly futile. An interest *per se* is neither the one thing nor the other. What interests one is just the thing itself. Egoism reduces to the foolish proposition that an interest is always somebody's interest. Altruism reduces to the foolish search for an interest in which nobody is interested.

To sum up, then, a person is the subject of interests and

these interests are manifold. His interests bring him into contact with other persons and with things. Nevertheless, his interests remain always his and their motive power so far as he is concerned arises from that fact. Certain causes or ends appeal to him. At the same time that which he is interested in is mostly outside himself. He is a sharer in certain concrete ends which must be realized in co-operation with some and against the opposition of other persons. His interests are partly private and personal, but as a rule they are shared by a smaller or larger number of other persons. His interests are in no sense confined to the present. They may have their roots in events that happened years or centuries before he was born; they may have a continuance which, in comparison with the fleeting life of the individual, may be called permanent. He may value some of them especially because they are his and have a peculiar personal charm; he may value others far beyond the estimate that he sets upon his personal existence. The law exists and functions within such a complex of interests and as a factor in a community whose members are subjects of interests. We must next consider what this function is with reference to the raw material of human interests.

VII. LAW AS THE EVALUATION OF INTERESTS

It is manifest from what has been said that the interests even of a single individual are almost inconceivably numerous, and that they are related to one another and to the interests of other persons in the most complex ways. They may draw him into associations with other persons who have like interests, or whose interests are reciprocal to his, or on the contrary they may set him in opposition to others. For interests may conflict. Interests of a single individual may conflict with other interests of the same individual. Personality is not so simple that it consists of one interest after another, each getting out of the way before the next arrives. Nor can it without effort be made a practicable co-ordination of interests united in a reasonably harmonious whole. The interests of one person

may bring him into conflict with other persons. The ends of different individuals may be impossible of realization by both of them. Even if the question is not one of simple incompatibility, an infinite amount of adjustment is necessary to avoid a disorderly pulling and hauling of interests in which nothing worth while is accomplished. The problem is one which has to be solved both for every person individually and for the group. Every interest that the individual elects to make his own and to pursue can be realized only at the expense of other interests which he might pursue and which he may in certain cases feel to possess a high potential value for him. Every group also must reach some practicable co-ordination of its common interest with the other individual interests of its members, and also with the common interests of other groups and with the individual interests of non-members. The essence of the problem is adjustment, compromise, a wise restraint, and a respect for all the interests involved.

This process of adjusting interests is called evaluation. It is undertaken from all the various points of view from which interests may be in conflict. The individual is called upon to decide what interests are fundamental for him and what are of subordinate importance. He must continually pass judgment upon the various possible courses open to him; he must decide what he really wants, what has value for him when the various possible satisfactions have been considered in all their consequences and bearings. But interests are not evaluated from the point of view of personal satisfaction alone. They are evaluated from the point of view of their effect upon the associations in which the individual has an interest and these associations are themselves manifold. These associations and the ends they serve are themselves of all possible degrees of importance, from those which are of a passing and almost casual significance to those which in given cases are able to command the lives and fortunes of their members. The interests of groups also are incompatible or conflicting, not only as ends requiring the support of the individual, but also with the

interests of other groups and with the interests of other individuals. These conflicts call continually for conscious adjustment in terms of the relative value of the interests involved. Without such evaluation both the life of the individual and the life of the group would be a chaos of conflicting interests. Interests in themselves afford little or no guidance until they are clarified and stabilized by an estimate of their relative worth. Their rightfulness as guides of conduct depends upon their being viewed in their mutual effects upon one another, upon their being winnowed and selected, and upon their being brought into a practicable harmony with one another. Such a harmony is in no sense automatic. With habit or custom a given harmony may become largely automatic but in its origin it is the consequence of a process which is mainly conscious. Moreover, the adjustment, in order to be satisfactory, requires as wide a knowledge as possible of the meaning and bearing of the interests to be harmonized. There is no short and easy rule which can be learned and applied to all cases. The process is piece-meal, in the sense that the whole range of human interests is never dealt with all at once, but it goes on continually in the minds of all men and any adjustment of interests that may be reached is subject to revision in the light of a shifting of the interests and a better knowledge of their bearing upon one another.

The process of evaluating interests, therefore, is the foundation both of the achievment of personality by the individual and of the stability and order of the community. So far we have spoken as if it were a process carried on by each individual for himself, though we have insisted that the interests evaluated are considered not only as sources of personal satisfaction but also in their bearing upon other interests having a wider significance. And in a sense it is true that evaluation must take place always by individuals. The obvious reason for this is that there is no other being who can evaluate. There is no group mind or collective person by which interests can be weighed and estimated. If the adjustment or harmonizing of interests

takes place at all, it can do so only by the reaction of individual minds upon the problem which their conflict presents. It is indeed true that minds in groups are different from the same minds not in groups or in other groups, but this does not alter the fact that all evaluations are some individual's evaluations. It is important, however, that this proposition should not be misunderstood. To say that evaluation takes place only in individual minds should not be confused with the totally different proposition that evaluation is made entirely in terms of the relatively private satisfaction of the person who forms the judgment. As we have pointed out above, private satisfaction is merely one category in terms of which interests are judged; it becomes quite meaningless when it is stretched to cover everything that the individual considers to be valuable. Men are prone, no doubt, to attach undue importance to that in which they are privately interested, but as a rule this is a perfectly honest mistake concerning the actual importance of the interests in question, Very few men imagine that the interest is important merely because it concerns their private satisfaction. Private satisfaction or individual happiness is of course a relevant consideration in any estimate of interests and one that the individual ought to take into account, but even men of quite ordinary intelligence and good will habitually make the distinction between the bearing of conduct upon what they regard as their own private interests and its bearing upon the private interests of others or upon interests which are not private at all. Private satisfaction is only one of the points of view from which interests are evaluated, and the ordinary man does not as a rule regard it as a particularly important point of view. The individual continually judges the value of conduct from other points of view, such for example as its bearing upon his family, or upon his church, or upon his city or nation.

This process by which interests come to have for the individual not merely a certain appeal and attraction but a relatively stable value is in no sense due to a unique faculty or intuition which is able to assess the value of an interest, as one might

say, merely by inspection. The basis of the process is comparison, the weighing of relative probabilities, the foresight of consequences, and the detection of identities and differences. Like any other operation of thought, therefore, it needs an apparatus of types and classes. Though carried on continually, it is not a process which makes a fresh start with each problem as it is presented. The categories used are carried over from one problem to the next as more or less permanent formulae for the making of judgments, though also no doubt with more or less continual reconstruction to meet new difficulties which the accepted types are not adequate to solve. There are categories of value just as there are categories of explanation. As we have seen, personal satisfaction (in the usual restricted sense of the term) is one such general class or type; certain interests can be placed at once as having a bearing, positive or negative, upon it and their value is so far fixed in relation to other interests, though of course it often happens that such interests may have a place also in other categories which may affect the final judgment of their worth. Self-culture, good taste, public service, courage, honest dealing are other examples of categories which are constantly used in assessing the value of specific interests. This dependence upon types is no accidental phase of the process. It is part of the way in which thought works. There is no intuition of value, just as there is no intuition of truth. There are judgments and judgment is always a making of comparisons and a detection of relations. It can take place only within an established structure of knowledge and values. It is of course true that no individual makes these categories wholly for himself. He receives them in their large outlines as part of his social heritage and holds most of them in common with his associates.

Thus it happens that social institutions themselves stand in the most intimate relation to the stable evaluation of interests. On the one hand they are supported by the conviction that they do represent and embody a solid value, that they minister to interests which are not to be neglected. They form the basis,

therefore, for further evaluations. Thus the bearing of any interest upon the value represented by the family, for example, may be sufficient to determine the worth of that interest. On the other hand, it is typical of many such associations that they supply an apparatus for arriving at judgments of value which are accepted as more or less objective by the members of the group. The valuation of interests is too important to be left wholly to individual reactions occurring merely as occasion may dictate. This again is no accidental feature of group-life or of the process of evaluation. The group cannot exist at all except on the supposition that it preserves a practicable harmony of interest. The interests of its members must be harmonized with one another; the interests of individuals which might obstruct the realization of common aims must be brought into harmony with the common interests; the common interests of the group must be harmonized with the interests of other groups or of non-members. The organization of the group has to seek, therefore, not only ways and means to secure the common interest. It has also to set up valuations which will settle the relative worth of the multitude of interests with which, in one way or another, the group is in contact. Political and quasi-political groupings in particular are organized to create such official valuations.

This organization of the process of evaluation may be made clearer by a single example, the judicial process, which is perhaps the oldest and most elemental function of government. This function is obviously the adjustment of conflicts of interest arising between the members of the group. It expresses a more or less official judgment upon the rights and wrongs of the incompatible claims advanced. In the past such an evaluation of interests might take place without creating an obligation upon the part of the judges or anyone else to use coercion in support of the decision. What is arrived at is a judgment looking to the adjustment of a specific conflict of interests, such for example as is involved in a dispute over a contract or over the use of a piece of property. Both parties have interests which they may justly expect will be safeguarded, but their

claims are mutually incompatible. Almost any civil suit is an illustration of such a situation. If the criminal law illustrates it less well, this is because crime has come to be conceived as an offence against the state. The criminal interest is the extreme case that cannot be adjusted but must be suppressed. Nevertheless, no enlightened criminal jurisprudence can regard suppression as an adequate solution except in the relatively rare case of a criminal who is incapable of socialized interests. The more enlightened treatment of criminals recognizes that here too the problem is one of maladjustment of interests. In certain newer types of cases, such as those which come before juvenile courts, the object is manifestly to preserve interests by a process of adjustment. From the point of view of the group itself this function corresponds to the obvious common interest of eliminating friction and of preserving the peaceful course of affairs, and of recognizing all the interests which need the support of organized authority. In this way the administration of justice is what Professor Duguit calls a public service. The organization in this case serves both the purpose of adjusting conflicts and of providing the means by which the common interest can be preserved.

This illustration may serve further to show the necessity of the type in organized as in individual valuations. The judicial judgment is face to face with a specific conflict of interests, an accomplished fact between definite persons or corporate bodies. Such an adjustment cannot be made in the light merely of an unformulated sense of the justice of the particular issue. Such a procedure is too uncertain and also imposes too great a strain upon the initiative and free intelligence of the judge. It will be remembered that this was precisely what Plato proposed should be done in his *Republic*. The rulers were to be selected by a long course of education and were then presumed to possess a wisdom which would enable them to determine what was just in each particular case by a full examination of the facts of the case itself and by that alone. It was to be a government of men and not of laws. It is obvious that if such a system

were possible it would have advantages over one which reduces large numbers of cases to determination by a single rule. But the capacity to envisage the whole situation and to judge the individual case as a unique occurrence can be claimed by no fallible human being. Human experience pronounces in favor of a government of laws rather than a government of men. And Plato himself, in his later years, recognized the impracticability of his earlier ideal, and in his *Laws* laid down the general principles of a legal system which he believed should be established in the state.

The particular conflict has to be brought under settled categories of valuation. A general type of interest has to be subjected to a general valuation and this general valuation has to be made the key to a settlement of particular conflicts. Homicide is a type of invasion of a kind of interest and calls for a settled reparation according to its nature. Such general valuations of types of interest are laws. They represent the more or less stable estimate of the members of a community regarding the general importance to be attached to a given class of interests. They may be matters of custom or convention representing the judgment partly of unorganized individuals and partly of courts acting in an official capacity where the generalization has been gradually formed in the course of dealing with a long series of particular issues. They may be the acts of a legislative body in the effort to prepare a type of adjustment in advance. In either case they are valuations set upon a certain class of interests, setting limits and conditions within which the interest is to be pursued in the light of its bearing upon other interests.

This aspect of legislation is not hard to illustrate and it emphasizes a phase of law quite other than the imperative phase. It may be illustrated in its crudest form perhaps by the passage of measures of taxation and the appropriation of revenues. These are as clearly processes of evaluation as the same kinds of action when performed by the individual. With a given outlay only certain things can be bought; what is expended in behalf

of one interest is inevitably taken from other interests upon which it might have been spent. Moreover, levying taxes evidently involves the choice of the interests which are to bear the incidence of the taxation and a decision regarding the distribution of the burden among different interests. But the valuation of interests does not stop with cases that involve assignable monetary values. The establishment and development of a school system certainly demands the valuation of educational aims and processes. There is a variety of legitimate claims that can be made in connection with any plan of education. There is the need of the community for certain types of good citizenship; there is the reasonable claim of the individual to an education which will bring him some increment of power, either in the form of efficiency or in the less tangible form of spiritual self-development; there are the manifold needs of the industries for persons trained to take a useful place in the scheme of production. All such claims and many others are reasonable but they are all likely to be more or less conflicting, and just as the problem has to be solved separately by every individual, so it has to be solved at large by some kind of educational policy for the community.

To take another example, the passage of a workingman's compensation act is clearly an evaluation of interests. So long as industrial accidents occur, somebody obviously has to bear the cost of them. If the individual laborer and his family are left to bear them alone it can only be at the cost of recognized interests both of these individuals personally and of social interests which they represent. The cost comes out of their happiness, out of their standard of living, out of the education of the children in the family, — in a word, out of values in which they have a vital interest and which are matters also of more or less general concern. If, on the other hand, the cost of industrial accidents is to be borne wholly or in part by the community, the burden must be reflected in the tax rate and this in turn will more or less affect a mass of interests that is indescribably complex. Or again, if the cost is to be assessed wholly or partly

against the industry, it may have wide-spread effects upon the prosperity of business concerns and in the end must appear in the price of goods and so be passed on to the whole body of purchasers. The adoption of any sort of policy is inevitably a decision that the cost shall go to one interest or another. The assessment of the interests at stake may be blind or it may be intelligent, but in any case the policy adopted will necessarily be an attempt to make effective some sort of decision about the relative value of interests and about their mutual relationships.

VIII. THE AUTHORITY OF LAW

Let us return now to the question which we set out to examine, the question of the nature and justification of authority. We have argued that the law deals with the manifold human interests which exist within a community, that it represents a system of relatively stable judgments of value concerning these interests, and that its end is to safeguard as wide a range of interests as possible, due regard being given not only to the number of interests but to their intrinsic importance. If this view be correct, it is obviously meaningless to ask further why law in general has authority. It has authority because of its very nature. It is idle to seek for a value to justify the process of valuation. It is evident also where in general the justification of a particular law or policy must lie. Like any other problem, the evaluation of interests is settled when it is settled correctly. In other words, the correctness of the solution cannot be judged by its source. A law must be judged according to its content, that is, according to the correctness of its estimate of the interests with which it deals and also to its practical success in making effective the valuation it expresses. It is clear, therefore, why this conception of law gives a radically different view of authority from that implicit in the doctrine of sovereignty. The latter is a purely formal conception of authority. The law is authoritative because of the source from which it comes. It is the voice of a superior person, either of an individual in some way designated as superior or of the collective person or state.

This view neglects the fact that, as an evaluation of interests, a law has to demonstrate its correctness in a way fundamentally like that by which any other decision is justified. Verification is in terms of content and not of form. To urge formal correctness exclusively is nothing but a way of withdrawing a favored solution from criticism.

This conclusion brings us to the threshold of a fundamental philosophical problem into which, however, it is not necessary for us to go, the problem, that is, of objective values. All that political philosophy really needs is the assumption that the settlement of a question of value is not fundamentally different from the settlement of any other question. What needs to be excluded is the opposite assumption, that a value is a sheer subjective preference, an assertion that, "I prefer this because this is the sort of thing I prefer." As a matter of practice no one doubts that questions involving the relative importance of interests can be clarified by thought and discussion, or that the field of possible agreement between different individuals is unlimited for all practical purposes. The conditions of agreement are a knowledge of the interests at stake, a certain respect for other men's interests, and a sympathetic appreciation of other men's points of view. And there is no assignable limit to the possible development of these qualities. On the practical side agreement about value is much like agreement about truth. It is a question of getting those who judge to see the implications of their judgments in terms of their effects upon other possible judgments. Absolute agreement may be attainable in neither case, but substantial agreement is no more difficult to obtain in the one than in the other. It is about as common in one as in the other.

In either case no good end is served by exaggerating the amount of agreement that exists. There are and always will be persons who cannot understand even mathematics. There are and always will be persons whose minds are opaque to given kinds of value. So far as concerns an individual, it is always possible that he may reach the limits of his powers, either intel-

lectual or moral, before he can see the point. On the other hand, a given individual may see a point in advance of that at which accepted theory or accepted practice has arrived. He may be a genius, which means that he may be right while every one else is wrong. The appeal in such a case must be from Philip drunk to Philip sober; it must look to some future agreement. But there is always the possibility that for the time being no agreement is possible. In the nature of the case there can be no ready-made solution for such situations, since the situation exists precisely because the solution is lacking. All that a general theory can hope to do is to induce a sober acceptance of responsibility by all parties, — the limitation of coercion to cases of real need and a fair shouldering of the burden of proof by the dissenting minority. But one point at least is clear. It is worse than useless to bring to bear upon such a situation the *ipse dixit* of a merely formal authority claiming a right to command by virtue merely of status.

No theory of sovereignty and no respect for formal authority can alter the fact that disagreements occur which are for the time being insoluble, nor even the fact that perhaps most individuals are at times more or less out of accord with the common estimate of values. This is a fact which is at least as vital to social progress as the fact that for most purposes a substantial agreement is usually attainable. It is certainly not inconsistent with the assumption, with reference to values as well as with reference to truth, that there is for any problem an optimal solution, a solution which would call for no further revision, the state of the facts being what it is. Our discussion has enabled us to see what the standing of such an optimal solution is. It is not an existing absolute authority, but a methodological ideal.

It is obvious that from the point of view here adopted no very definite line can be drawn between law and morality. So far as we are able to see, this conforms accurately to the facts. There is no such line. The familiar distinctions, such as that morality is relatively a matter of character and law relatively

a matter of overt action, or that law is that which the courts will enforce, have a relative truth and a relative utility for some purposes. No such distinction, however, will bear analysis as a theoretical delimitation of different classes of phenomena. Broadly speaking, the making of law is a case of ethical evaluation. There are ethical evaluations which can be little aided by coercion because conformity of external conduct has relatively little to do with them. Such evaluations as a whole are commonly called moral as distinguished from legal, though it is obviously false to suppose that rules of law are always or mainly enforced by coercion. On the other hand, if coercion must be used, there is an evident practical advantage in confining force to constituted authorities and public agencies. The rules upon which such bodies act are in general called legal as distinguished from moral, though again it is obviously false to suppose that constituted authority makes law by virtue of its action. Any rule of conduct, whether called legal or moral, is justified solely by the fact that it is right in terms of its effects on human interests. How the rule is sanctioned is a practical rather than a theoretical consideration.

Both morality and law have their common sources in the process of evaluating interests which Professor Krabbe refers to as the "sense of right" (*Rechtsbewusstsein*) and which he discusses at length in Chapter III of the work here translated. Law exists only because men do continually value and revalue interests, because they do aim at a harmony of interests, because they seek to safeguard their own interests and recognize the propriety of respecting the interests of others. This sense of mutual rights and obligations is the bed-rock upon which political society is built. Upon it are founded political organizations, which, broadly speaking, exist first in order that the valuation of interests may be more certainly ascertained, and second in order to insure that public interests be preserved and the value imputed to them be realized. This brings us finally to Professor Krabbe's theory of the state. In conclusion we shall summarize briefly the chief principles involved in his theory.

IX. THE MODERN IDEA OF THE STATE

The fundamental aspect of the modern state is its thoroughgoing subjection to law. The law represents an actually achieved evaluation of interests. Such an evaluation of interests yields the standards by which conduct is judged and gives rise to such broad categories as right and wrong, the lawful and the unlawful. It is such an evaluation that gives power to those institutions which exist partly as means to the clearer and more authoritative valuation of interests and partly to foster such interests as it may be deemed advisable to entrust to an official organ. In the end such institutions are legal institutions and rest upon men's judgment of the substantial value of the human interests which are sustained by them. At any given time, no doubt, any such collective body of valuations contains much that is merely traditional, for it does not lie within human power to create the system anew, nor does valuation ever start with a clean slate. There is, moreover, a wide range within which individuals differ in their power to grasp the significance of the institutions under which they live. Change takes place constantly in the details and occasionally reaches to a revision of the main outlines of the structure. It starts as a rule with the more original and venturesome individuals, whose natural powers or peculiar circumstances enable them to see a possible new adaptation of old ideas. Nevertheless, the solid structure rests upon its general harmony with human needs, its conformity with that which men feel to be fit and right, and the feeling is largely a conscious acceptance of the values which institutions serve to support. Political organization, therefore, is rooted in law, in settled ideas of right and wrong, good and bad, and these ideas in turn are rooted in consciousness, from which the notion of valuation is inseparable. The fundamental concept for the theory of the modern state is law.

It is obvious that law is one expression among others of what is called generally the civilization or the culture of a commu-

nity and that the development and effective working of any such system of common evaluations is not independent of the other factors of culture. It depends, for example, upon that free interchange of ideas which is certainly rendered easier, if not made possible, by a common language. It may be aided by a common religion; it is certainly weakened by a wide divergence of religious ideas, especially if these ideas find expression in antagonistic religious institutions. A common law is evidently very closely related to that intangible complex of ideals which we call nationality, for the latter is very largely though not exclusively just the ideal of a common law and of common political institutions to express such a law. A common law cannot flourish except where there exists a common mentality in which it can thrive, and it may be laid down as a general proposition that the thinner and weaker this common mentality is in a community, the narrower the range of interests that can reach an accepted valuation in that law. When the basis of common agreement is slight, the law must be more general; more must be left to local groups where a better basis exists.

In general terms, then, the state may be defined as a community in which there does exist a common law. It is an association of men, occupying a definite territory, in which a common sense of right issues in general agreement regarding the value of both public and private interests. Such common agreement, as we have seen, expresses itself in organs which clarify and make explicit the common judgments of right and which also serve to maintain common interests. We must examine some of the more important elements of this definition and make clear some of its implications.

It is evident that as above defined state is a relative term. There may be, and in fact there often are, communities within communities, each marked with a common agreement about what is right. The smaller local community may have a well-defined common law which does not extend to the more inclusive community, though the latter may also have a well-defined common law which expresses the value of those wider

interests which are common to both. Any federalized state is an example of such an arrangement. The local community has in fact some degree of autonomy; its own peculiar law is effective for it. Moreover, the law of the federal state recognizes such local autonomy; its maintenance is a legally recognized value in the more inclusive system of law. Thus there is a recognized autonomy and subordination of one body of law within another, together with a recognized organization for settling the limits of jurisdiction. On the other hand, there are communities which are relatively independent in the establishment of their legal standards, in the sense that they are not explicitly a part of any recognized system of law in which they find their place marked out for them by judgment of a larger community. Such communities correspond to the sovereign states of ordinary political theory. Nevertheless, it is to be noted that even in this case independence is only relative. There is no organized community having a common law capable of imposing its values upon them. But there are no intrinsic limitations to community itself except the natural limitations that control the making of common judgments of value. And these natural limitations can expand or contract with those circumstances which enable men to reach a basis of common agreement. Thus, as we have seen, there is a more or less binding body of conventions and agreements in international law which do to some extent control the acts even of the more powerful nations and may be virtually coercive upon the less powerful. How far such general agreement can go, how wide a range of conduct it can be made to control, depends upon the extent to which a body of common interests can grow and the degree of agreement that can be reached in their evaluation. In any case, however, the term state is relative. It is in fact used of communities which are definitely subordinate as well as of those which are relatively independent.

It is evident also that in the actual configuration of states at the present time there is a large element of what may be called historical accident. We have insisted that the rise of the

national state in the sixteenth and seventeenth centuries was closely bound up with the extension of royal authority. Such authority frequently did not succeed in making itself co-extensive with nationality. It might fail to reach the limits of the potential nation or it might pass those limits and subject part or all of another nationality to its power. The territorial limits of the state, therefore, were often drawn along arbitrary lines, so far as any modern conception of political authority is concerned. The Revolutionary Period found the same royal authority spanning pretty diverse systems of law, as in France, or a fairly well unified system of law administered by diverse royal authorities, as in Germany. Out of this welter of inconsistencies the existing political units grew up, doubtless with a tendency to make the authority of the state more and more coincident with legal unity, but without ever arriving at that end. For this reason anomalies persist which are virtually accidents, from the point of view of present-day political philosophy. The mere inclusion, however, of diverse legal communities under one central control tends to the development of common interests and eventually of a common law. Thus states which originally may have been political anomalies from the point of view of theory may in time become normal.

As we have indicated above, the organs which arise in the community as a consequence of the evaluation of interests serve a twofold function. In the first place, some of them have what is called the law-making function. That is, they clarify and systematize and put in more effective form the evaluations which in any case take place spontaneously without the intervention of organization. Primarily this is the function which is served in the modern state by the representative legislature. On the other hand, there arise organs whose function it is to preserve and care for particular interests which are deemed to be of special public importance and which are also deemed to require the care of some such special governing body. Professor Duguit, as we have seen, has emphasized the fact that the growing number of interests which require such care and the

corresponding proliferation of governing organs for this purpose is an outstanding feature of the development of government at the present time. Not only has there been an increase of what are recognized as executive departments, but as the government was forced to assume duties farther and farther removed from the lines of traditional administration, there have been added boards and commissions whose action is in fact largely independent. They show the tendency to approximate the form of self-governing corporations, subject of course to more or less control either by the executive or by the legislature, at least so far as their major policies are concerned. Such boards are clearly agencies for the rendering of public services or for the care of public interests. Such services have come to make up a large proportion of all the work done by the agencies of government and this has led to Professor Duguit's conception of the state as a collection of public services. In other words, the public service is the type of governmental activity. The traditional functions of government, such as the administration of justice and ordinary executive action, are themselves public services.

In view of the theory developed in this book, however, it is clear that the state is not to be identified with any of the organizations which arise in the community to serve the ends of law. It is not to be identified with organs having primarily a legislative function because these organs do not in fact create law. They are instruments to "find" law, to develop and clarify it, to make it effective as expressing the true value of interests both public and private. But public organs for this purpose have their roots in the fact that evaluation of this sort goes on continually in an unorganized way by the judgments which men form as individuals and in groups regarding the value of interests. As Preuss insists, legislatures do not make law out of nothing. They organize the means for making a judgment, but judgment is an indefeasible aspect of men's minds in a community. Moreover, such organizations, however well developed they may be, do not supersede the judgment of men singly or

in groups regarding the value of interests. Such judgment continues to take place more or less independently of the action of legislatures. In the form of custom or convention it often succeeds in altering the accepted law without action by any legislative organ. The ultimate law-making power is nothing but human judgment itself acting upon human interests and deciding with reference to their relative value. The state, therefore, is the community acting in its collective capacity to recognize values. Nevertheless, it is easy to see why such theories as that of parliamentary sovereignty have fixed upon the legislature as the central body in the state. So long as such a body has an unquestioned authority, its enactments may be taken as *prima facie* law, though even a superficial examination of law shows its dependence upon the community and its public opinion. It is this fact which the theories of popular sovereignty vaguely express, while they retain the fiction of law as a fiat of will which obtains an ethical justification through consent.

On the other hand, it is no less an error to identify the state with the collection of agencies which function as preservers of public interests. This is a fundamental blunder because it misses the central point of the theory of the modern state,—the fact that all such agencies are creatures of the law. The law is the foundation of them all and for this reason law rather than public service must be the basic concept from which political theory starts. It is the failure to accept this principle which leads Professor Duguit, who regards the state as a collection of public services, to the assertion that the superior power of the ruling class is a sheer fact which cannot be justified, though he regards the rulers as subject to the law of social solidarity. But surely nothing is more obvious than the fact that, while sheer power is not excluded from modern government, the power of rulers is mainly and increasingly legal power. We have pointed out how this ideal of government subject to lawful responsibility and with legal safeguards to the citizen has run persistently through modern political theory and has embodied

itself more and more in modern political practice. The state is not a collection of public services. The state is the community which by its establishment of legal values creates agencies for the rendering of public services and the maintenance of public interests.

There is still another respect in which the identification of the state with public services is an error. It gives rise to a one-sided emphasis upon the interests which the law exists to support. It is evident that the law does not preserve public interests alone, unless the term is used in a sense so broad that it loses its definite meaning. Whether an interest is entrusted to a public agency depends not upon the recognition of that interest as having a value which must be preserved, but merely upon the conviction that public safety or well-being demands that the interest be conducted in that way. Even quite personal and individual interests receive the sanction and protection of law; they are recognized as having a value which must be preserved. Moreover, many activities carried on quite voluntarily by individuals or voluntary associations are of the utmost importance to the community; they may be public interests in every sense in which an activity managed by a governmental agency is a public interest. It is to be observed that in all these cases, however the activity is directed and whether the interest be deemed public or private, it is protected by law and its protection is an expression of the value attributed to it in the law. The action of a private person and that of an official are subjected to one and the same control, namely that of law, and the rights and powers of each are defined by law. Public and private interests are not defined by their relation to the state but by the manner in which they are conducted. Public interests are not conducted by the state, but by governing agencies created by law for the purpose.

The confusion of the state with the agencies of government, and also the confusion of the two functions of declaring law and rendering public services, have been persistent. The reason is no doubt in part historical. The absolute monarchy, from

which the modern state developed, united both the making of law and the care of such public services as the army, the police, and the judiciary in one person, the king. It was not until the predominance of the legislature under constitutional government was assured that legislation assumed the independence and the importance which it possesses in the modern state. At the same time, however, the growing complexity of government tended to obscure the distinction between legislation and public services, since, as a consequence of this complexity, other agencies besides the legislature came to have quasi-legislative functions. The traditional legislative, executive, and judicial functions are no longer entrusted to distinct organs, though they may for certain purposes be distinguished as types of activity. But in any case the state is not to be identified with any organization.

The theory presented in this book attempts an explanation of the modern state in terms of the sovereignty of law. It is not necessary to imagine a hypothetical entity or organism to which a quasi-personal authority can be imputed. The theory starts simply from the community itself with the net-work of jural and moral relations subsisting between its members. The agencies of government fulfil their functions only in connection with these established relations. The theory has at least the merit of moving in the circle of realities. It rejects such fictions as sovereignty and it cuts the ground from under all merely formal schematizing of law. It is in obvious relation to other tendencies in the social sciences generally and in political theory especially. As the reader will see, it is written with the drift of affairs in view. Speculation might easily be offered as to the effect of this drift upon the agencies and organization of government. It is not, however, the province of the political philosopher to create imaginary constitutions or schemes of government. Enough, if the general implications of the dynamic ideas can be made more clear.

G. H. S.
W. J. S.

AUTHOR'S PREFACE

The theory of the state developed in this book grew out of the results of my book, *Die Lehre der Rechtssouveränität* (1906). The latter was in the main a criticism of the theory of the sovereignty of the state, while the present volume aims chiefly to explain the positive principles of the opposed theory of the sovereignty of law and thus to formulate the modern idea of the state.

This book also was written in Dutch, my mother tongue, but has been translated into a language more accessible to foreigners. For this purpose I have chosen German again, because my conclusions are directed especially against those of German political science.

The translation is based upon the volume which was published in Dutch under the same title in 1915 but which was completed before the War. Later I published, also in Dutch, a work entitled *Het Rechtsgezag* (1917), which contains a defense and an elaboration of the modern idea of the state, called forth by the criticisms which appeared in this country. This work has been incorporated in the present volume. The German edition, therefore, embraces both the Dutch works mentioned above.

Leyden, May, 1919. H. K.

INTRODUCTION

THE MODERN IDEA OF THE STATE

The basis of the rulership (*Herrschaft*) which is essential to the idea of the state is a fundamental question which political theory must reconsider. The current conception of the state, growing out of the absolute form of government, regards it as an original manifestation of power, endowed by its very nature with the right of rulership.

After the theory of the legal state (*Rechtsstaat*) had been developed, there arose a conflict between this conception and that of an equally original manifestation of power, the law. This leads to the theory that the state is subject to law, or, in the well-known formula of Laband, "that the state can require no performance and impose no restraint, can command its subjects in nothing and forbid them in nothing, except on the basis of a legal prescription." [1])

Nevertheless, political theory cannot even now bring itself to abandon the old conception of the state as an original manifestation of power. Thus it is involved in an insoluble contradiction, for it must now accept the hypothesis of a dualism of powers; namely, that of the state and that of law. The efforts to overcome this dual-

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[1]) *Staatsrecht des deutschen Reichs*, Ed. 4, Vol. II, p. 173.

ism and to explain the subordination of the state to law have failed to achieve their object.

The actual course of public affairs, however, has given rise to an idea of the state which eliminates the difficulties of political theory. This, the modern idea of the state, recognizes the impersonal authority of law as the ruling power. In this respect it accepts the standpoint of the theory of the legal state as this was formulated by Laband. But it draws the ultimate conclusions from the ideas which lie at the basis of this theory. It no longer holds that the state subordinates itself to the law, but insists that the authority of the state is nothing other than the authority of law. Hence there is only one ruling power, the power of law. According to this view, the state is not coerced by law, but is rather endowed with the authority of law. The law is not a superior and the state a subordinate power, but the authority inherent in the state and the authority of the law are identical, so that the basis of the rulership of the state is coincident with the binding force of the law.

The present treatise aims to present this modern idea of the state.

CHAPTER I

THE AUTHORITY OF THE STATE AND THE AUTHORITY OF LAW

I. *The Opposition between the Old and the New Idea of the State.* As was pointed out in the Introduction, the modern idea of the state came to dominate political practice, while political theory still maintained the old view of the state derived from absolutism. Theory has not taken account of the change in the relations between rulers and subjects which has gradually come about during the last half century, or at least has not done so adequately.

For centuries our life has been dominated by the idea of a *sovereign*, having a subjective right to rule, and of a *people*, standing in a relation of political subordination. This sovereign was conceived as embodied either in a prince or in an assembly, and consequently its right to rule was viewed as a personal and subjective right. Since the Middle Ages political theory has continually discussed the question of the origin of this personal right of sovereignty and the purposes to which it must be applied, and the limitations which must in consequence be placed upon the sovereign's right to rule. We may pass over the theories relating to these questions, since practically the will of the sovereign, just

because it was the will of the *sovereign*, was recognized as binding upon all subjects.

Alongside the authority of the sovereign, however, there was from the beginning, indeed before the development of the idea of sovereignty, another authority: that of law. This law governed the mutual relationships between the individual members of society and was for a long time looked upon as a source of authority quite as independent as that embodied in the sovereign. In many ways the fact has been established that the authority of the sovereign was limited by the so-called rights of the people. The sovereign could change this law of the people only in co-operation with those members of society whose social standing was recognized by the law. The consent of the classes affected was necessary in order to abridge any of their rights in the interest of the sovereign, as in the expropriation of property or the levying of taxes. In other respects, the people's law grew and changed without assistance from the sovereign, who limited himself to maintaining and enforcing the legal order.

The eighteenth century brought a change in the relationship between the sovereign and the people's law in favor of the authority of the sovereign. When the sovereign began more and more to concern himself with the most diverse public interests, and the number of his decrees in this field multiplied, a so-called public law began to encroach upon the old common law as the ruling power in social life. It was not to be doubted that the validity of this public law was derived exclusively from the will of the sovereign; and it became a ques-

tion whether the binding force of the other element in the social order, which was embodied in the people's law, was not also to be traced back to the authority of the sovereign. To be sure, this law had not been created or promulgated by the sovereign, but the care for its maintenance and enforcement had, nevertheless, been assumed by him. It was, indeed, precisely this care for the administration of the people's law that formed the connecting link which made it possible to root the binding force of all law in the will of the sovereign. Thus the dualism of two independent authorities, that of law and that of the sovereign, was eliminated. The conception of law as a product of reason, which gained favor in the eighteenth century, gave support to this theory, since reason was much more likely to be found in the sovereign than in the people. And when, moreover, the sovereign authority was transferred from the old historical persons and groups, in whom it had been vested, to the people themselves, the tendency to look upon all law as emanating from the sovereign was still further strengthened by the theory of popular sovereignty, in which the people's law and the law of the sovereign are identified.

This change established both theoretically and practically the idea of the sole rulership of positive law as the expression of the sovereign will and consequently as the expression of law in general. Thus the idea of sovereignty attained its highest development. This idea of sovereignty still holds political theory under its spell. It has sought to free itself merely from the idea that the sovereign possesses a personal right to rule. Not the

king but the state is now recognized as the possessor of the sovereign authority; but since the state is regarded as a legal person and so requires organs for willing and acting, these organs now become bearers of the sovereign authority, and the idea of sovereignty has in fact remained undisturbed, even in its aspect of a personal right to rule. To this sovereign, or according to modern terminology to the state, is now attributed that ultimate and unlimited power so frequently referred to in the literature of the subject. The power of the state, says Maurenbrecher, is irresistible, infallible, holy. Otto Mayer speaks of the "unconditioned predominance of the state's authority," and of "the state's capacity to exercise a legally paramount will;" Jellinek speaks of the "unconditioned enforcement of its own will against others;" and Laband discusses "rulership" as the "specific prerogative of the state." All these characterizations grow directly out of the idea of absolute monarchy.

II. *The Rise of the Modern Idea of the State.* The idea of the state which adopts as its central conception an assumed right to rule vested in a specific person, fell into disrepute with the introduction of the constitutional system, even though this right was exercised in the name of the state as a legal person. The will of the old historical possessor of sovereign authority is no longer binding in and of itself; the co-operation of parliament is required. In parliament, however, it is a changing majority, composed now of certain persons and now of others, whose co-operation suffices. Conse-

quently the exercise of the sovereign authority, so far as it concerns parliament at least, no longer rests in the hands of specific persons. In proportion, therefore, as the decisive power in the state devolves upon parliament, it becomes evident that the positive law owes its validity to an authority which in the concrete is constantly changing, but which in the abstract is personified as the "legislative power." Consequently it is also evident that the authority of positive law requires another support than that which is found in the will of particular members of parliament.

This circumstance involves the necessity of recognizing in positive law something other than the will of the traditional sovereign. The fact that parliament is elected by and from the people favors the view that it is an organ of the people's sense of law and right. Accordingly it would be precisely this sense of right which is expressed in the positive law. Thus a completely new basis for the authority of positive law comes into view. Not the will of a sovereign who exists only in the imagination, but the legal conviction of the people lends binding force to positive law; *positive law* is valid, therefore, only by virtue of the fact that it incorporates principles of right (*Recht*).

With this new theory of the validity of positive law, there comes also as a practical consequence of the constitutional system the possibility of subjecting the bearer of the earlier sovereign authority, the king, to the positive law. In practice it was already conceded that the state might be bound by the common civil law. This was explained by a theoretical fiction which im-

puted to the state a double personality; one of these, the "state-fisc," was subject to the law which was binding upon all other persons, while the other, the "state-sovereign," was not. Under the domination of the constitutional system, however, where king and parliament together decreed the positive law, this fiction was no longer necessary in order to establish the validity of common law even for the sovereign. In fact, the positive law, as a product of both the king and the popular representative body, was thus made superior to the sovereign in the original sense of the term. And consequently there was no difficulty in recognizing the supremacy of positive law even in the field of public law. Under the designation of the legal state (*Rechtsstaat*), this supremacy of the positive law has been established step by step. First it was merely a *limitation* of the sovereign authority; then it became the demand that the mere will of the sovereign be *replaced*, so far as possible, by law; and finally it brought about the unconditional victory of the law with the *exclusion of all original sovereign authority*. Thus a complete transformation was accomplished. The sovereign as an original source of authority with a claim to unconditional obedience was superseded, just as the law had earlier been superseded as an independent power in opposition to the sovereign.

III. *The Significance of the Modern Idea of the State.* If now we ask what great idea won the ascendancy in the process just described, we can answer that a *spiritual* power has taken the place of a *personal authority*. We no longer live under the dominion of persons, either

natural persons or fictitious legal persons, but under the dominion of norms, of spiritual forces. In this is revealed the *modern idea of the state.* The old foundation which heretofore had mainly supported the life of the community, the personal authority of the sovereign, has been compelled to give place (or at least is more and more giving place) to another foundation which is derived from the spiritual nature of mankind. This spiritual nature is the source from which spring *real* forces and through which duties are aroused to living consciousness. These forces rule in the strictest sense of the word. Obedience can be freely rendered to these forces, for the very reason that they do proceed from the spiritual nature of mankind. The power which they are able to exert has its roots just in this,—that we voluntarily follow their guidance. Such a spiritual force permits law and right (*Recht*) to be born and continually permits them to be born anew. That which works in us as the instinct, the feeling, the sense of right, and which lives in our souls as an original force of nature, lies at the basis of that authority which compels us to live in a society. It is the foundation of the rulership which is inherent in the idea of the state. Hence we no longer perceive the state as localized in a sovereign, but we find it wherever we perceive the power of the law to create obligations. What is now in actual practice adorned with the old name of sovereign is a man or an assemblage of men upon whom the law has laid a task. They are not, therefore, invested with a power to be expressed through their will in independence of the law.

Political theory has not taken account of all this; it has persistently clung to the old idea of sovereignty. It cannot fail to perceive that in every field, even in that of international relations, the authority of law is growing. But it shrinks from making a change of principle by abandoning the idea of personal sovereignty, tracing the power of the state to the authority of law, and thus recognizing the fact of the sovereignty of law. It is indeed difficult for it to free itself from the conception of a personal power which is supported by a tradition of centuries and from a terminology adapted to this conception. So we have those juristic fictions which, while they recognize the predominant power of the law, still seek to save the idea of personal sovereignty. We are familiar with such fictions as those of Jellinek, which assume a "self-imposed obligation" of the sovereign in order to maintain his subjection to law. We are familiar with the exaggeration of power which is attributed to the king in words, while at the same time he is bound on all sides by law in the exercise of this power. We are familiar with the sophism of the distinction between power in and of itself and the exercise of power. Thus juristic dialectic continues to be cultivated, while political practice is already revealing to us the effective truth of an entirely different idea. We must now turn our attention, therefore, to this modern idea of the state, which is absolutely opposed to the idea of sovereignty, with its postulate of an authority standing outside the law. Thus we shall see clearly that more and more political communities are ruled not by external powers, but by inner spiritual forces dwelling in men

and working out from them. Everywhere, in every field of social life, appears the new ruler, law, with the full certainty that sometime there will fall to his lot over the entire globe that unlimited and undivided rulership which the best of our race have at all times longingly desired.

CHAPTER II

THE AUTHORITY OF THE SOVEREIGN AND THE AUTHORITY OF THE LAW IN HISTORY

I. *The State Originally a Community founded on Law.* Sociological and historical investigations have shown that the reciprocal interdependence which has existed between men from the earliest times has caused them to live in organizations which were in no way imposed upon them from the outside, that is, by a sovereign, but which arose from instinctive feelings, though these feelings were clearly differentiated only at a later stage. This is the original type of community, in which duties are accepted without owing their sanction to a sovereign.

II. *The Rise of the Authority of the Sovereign.* A sovereign first appears when the tribe, presumably for military reasons, accepts a chief and renders him obedience. In the beginning this chief derives his rights from the organization of the community. His powers therefore have their origin in the same authority which governs the reciprocal relations between the members of the community, viz., the law. If, then, the modern theory of the state recognizes only the authority of the law as binding, and no longer admits an independent and original authority in the sovereign, this is merely a return to

the primitive relation between the chief of the community and the community itself. At least this is true in so far as the authority of the chief at that time sprang from the organization of the community and the authority of this organization was recognized as the sole source of rulership.

The original relation of the prince to the community, however, could not endure. This would have been possible only in case an organized means of law-making had continued to exist, but it was precisely this which was interrupted by the disappearance of the popular assembly or representative body which provided for it. It is indeed true that there appeared at times in the organization of the state an assembly of estates, but its function was not the making of law but more especially the representation of interests. Its origin and *raison d'être* are to be found in the limitation of princely power, in the protection of the rights and privileges of the estates. This disappearance of a popular organ of legislation made it impossible for the community to preserve a connection between its own inherent legal order and the authority of the chief, such as might have kept alive the notion that this authority was an outgrowth of the communal organization.

Moreover, since the chief became a great landowner and also made the army and the official class subservient to him, there fell to him a vast social power to be organized for his own purposes. Because of the growth of this power, and also because the position of chief became hereditary, there arose an actual personal authority so extensive that it was able to make itself inde-

pendent of every other power, even of that belonging to the legal order of the people; and in fact it did make itself thus independent. When this happened, the community was ruled by two different authorities, neither of which could be derived from the other, the primitive authority of the law and the new authority which proclaimed itself as that of the sovereign. Frequently the territories controlled by these two authorities did not coincide. In Germany several independent sovereigns might be found within territories where one and the same law was in force. In France the opposite condition existed, since one large territory under a single sovereignty was divided into several distinct jurisdictions each with its own court (*parlement*).

With the appearance of a sovereign authority distinct from the authority of the law, there arose the need of giving it a legal character, though its basis was extra-legal. Down to our own day political theory has assumed this task and has made the authority of the sovereign its central point, to the almost complete neglect of the authority of the law. Indeed it may be said that since the Middle Ages political theory has been nothing more than a theory of sovereignty and that the theory of the state has devoted itself to the elaboration of the organization of powers involved in sovereignty.

III. *Ancient Political Theory as a Theory of the Legal Order of the Community.* It was otherwise in ancient Greek times. Then there was far more emphasis upon the organization of the people, or the legal order of the community, than upon the organization of powers. One

can scarcely find in Greek political theory the notion of a sovereign invested with an inherent, independent authority. Plato's *Republic* attempts to sketch an organization of classes in which justice can be realized. In his *Laws* Plato regards not persons but only Laws, i. e., an impersonal authority, as the ruler. In Aristotle the organization of powers receives more attention. The classification of powers as monarchies, aristocracies, and democracies (timocracies) is to be traced to him. But this classification possesses no theoretical significance and does not indicate any distinction between law and sovereignty. It is merely a form of organization in which the self-directing life of the community, as a condition of the moral development of the individual and the race, expresses itself. The end is ethical, as is the case also in the Platonic theory of the state. If, therefore, one is to speak of the Greek idea of the state, so far as the writings of Plato and Aristotle are concerned, this idea implies not a relation between sovereign and people, but rather one between individual and community. Thus the emphasis is placed upon the natural inclusion of the individual in a single encompassing community. Consequently subordination to an external authority, such as later found expression in the monarchical state, has no place here and the state as a relation of sovereign to subjects is never thought of. In the Stoic philosophy again the idea of the community appears, but now it is extended to the whole of mankind; an order based on natural law determines the relations between the members of this community, while political organization is entirely omitted.

IV. *The Political Theory of the Middle Ages as a Theory of Sovereignty.* It is in the Middle Ages that we first find a conception of the state characterized by the opposition between sovereign and subject, after a sovereign authority outside the organization of the community had in fact developed. In the Middle Ages attention was directed wholly to political organization and the community with its inherent legal order was entirely lost sight of. The strife of sovereignties resounds through political theory; emperor and pope, the personifications of secular and spiritual authority, contend for mastery. Political theory interests itself exclusively in political organization; the community and its internal legal order are scarcely mentioned. A basis for secular sovereignty independent of the Church is eagerly sought, until the fact of the state's independence becomes so overwhelmingly evident that it is no longer important to maintain its claims against the Church. Then the significance of sovereignty as opposed to the subject people is made the object of investigation. It is worthy of note, however, that in the Middle Ages, in so far as Greek philosophy again gains ground, the community, the social group, comes to be considered anew. This is shown chiefly in Thomas Aquinas, who, along with the Aristotelian philosophy, revived also the Greek idea of the state, which derived rulership from the natural subordination of the individual to the community. However, he makes no effort to discuss from this point of view the relation between the sovereign authority of his time and the legal organization of the people. In fact, there was no occasion for

him to do so, since his own political theory was primarily directed to showing that secular authority exists to further the purposes of the Church.

V. *The Meaning of the Contract with the Sovereign and of the Social Contract under Absolutism.* After the Middle Ages, when the independence of the sovereign as against the Church had become an established fact, sovereignty remained the chief point of interest, but in the face of a growing absolutism it was now considered with a view to defining the limits of the sovereign's power. For this purpose political theory adopted the well-known conception of a contract with the sovereign which had already been used to secure to the secular power a basis of its own as against the Church. This contract proceeds from the community, from the *universitas populi*. The community, represented by the magnates of the land, as one party to the contract, is conceived to grant or convey sovereign authority to the prince under definite conditions. So long as this was merely a way of maintaining a special basis for secular sovereignty against the divine origin of the Church, there was no further investigation of the authority inherent in the community. But when the contract with the sovereign came to be considered as a means of limiting his power over the people, the next step was naturally to inquire about the source of that authority, which must lie in the community, inasmuch as the community had granted it. It is generally agreed that Althusius was the first to investigate this question. [1])

[1]) *Politica methodice digesta*, 1610.

Now it is surprising to observe that even Althusius assumes that the sovereign authority is established by a contract in which the community subjects itself to this authority. There is in reality no place for such a contract in his system because the so-called social contract, which explained the origin of the community, provided also for the various organs for maintaining its interests. The organization of sovereignty, as well as the legal relations between the members of the community, is a product of the social contract. The contract calls into being a community fully equipped with all the necessary organs. Consequently Althusius is the first writer (his contract with the sovereign being left out of account) who, strictly considered, does not base the authority of the sovereign and the authority of law on different foundations but considers the former as an element in the organization of the community. This sovereignty, with the organization of powers which it implies, is not independent of the law and outside it but rather is rooted in the law. Nevertheless, as was observed, we still find in Althusius a contract with the sovereign, although the community is fully equipped to perform all the functions of the sovereign. Through the agency of its highest organs, the Ephors, the organized people enter into a contract with the sovereign by which a *summus magistratus* is set up and endowed with a limited sovereign authority, with a provision for his recall in case his power is misused. The reason for this contract, which is entirely superfluous so far as Althusius's theory is concerned, is to be found in the organization of the German Empire,

which was obviously his model and in which the emperor so nearly played the part of his chief magistrate. So far as the content of his social contract is concerned, this contract with the sovereign is entirely unnecessary, since every thing would go on just as well without it as with it, and without the chief magistrate, as with him. Thus if Althusius had been more clearly conscious of the importance attaching to the social contract in his political theory, he might be called the father of the theory of the sovereignty of law, though with the reservation that the fiction of a social contract is no longer required as a basis for this sovereignty.

VI. *The Relation between the Sovereign Authority and the Organization of the Community in Grotius and Others.* In Grotius also we find that there is a relation between the sovereign authority and the organization of the community, but the relation is much less important than in Althusius.

Grotius starts from the following definition: "The community is a perfect coming together of free men, associated for the sake of enjoying the advantages of law and for the common utility." [1]) The point to be emphasized in this definition is the "perfect coming together," by which is meant such a relationship that an ultimate or sovereign authority (*summa potestas*) arises from it, or at least is contained in it. So far Grotius and Althusius follow the same path. It is possible, however, for this sovereign authority to be divorced

[1]) *De jure belli ac pacis*, Lib. I, Cap. I, Sect. XIV, 1. Est autem civitas coetus perfectus liberorum hominum, juris fruendi et communis utilitatis causa sociatus.

entirely from the community, either by alienation, if the people renounce it in favor of another (the prince), or if it is taken by conquest, in which case the prince possesses it as a patrimonial estate. [1]) The recognition of the community as the source of ultimate authority is important only if the prince's power is lost or if the reigning family dies out. The sovereign authority then reverts to the people which again becomes *sui juris*. This connection between the community and the sovereign authority, together with the possibility that the latter may be possessed by some one other than the people, leads Grotius to say that this authority resides in a twofold subject, the people and the prince. The people he calls the common subject, the prince the special subject. The reason why he speaks of a common subject in connection with the people he explains as follows: "For the authority which is in the king as the head, is in the people as the whole body, of which the head is a part." [2]) In the last clause, the notion is again expressed that the power of the prince is part of the organization of the community.

In the works of other writers this relation is expressed by the opposition between the "real sovereignty" and "personal sovereignty." This does not mean, as Gierke supposes, that a twofold sovereign is assumed. The sovereign authority lies either in the people (the community or *civitas*) or in the prince. But there is a feeling that some connection exists between the people and the sovereign authority, even when the latter is

[1]) *Ibid.*, Lib. I, Cap. III, Sect. XI, 1.

[2]) *Ibid.*, Lib. II, Cap. IX, Sect. VIII, 1; Cf. Lib. I, Cap. III, Sect. VII.

possessed by the prince, since both have a share in the "sovereignty," as the terminology itself indicates. The purpose of this terminology was to distinguish sovereign and community and yet to make clear the connection between them. Grotius, however, got no farther than an insight into the fact that sovereignty, ultimate authority, arises from the life of the community. That it arises from the community in the same way in which law does, that the organization of powers is essentially an organization by law, is less clearly perceived by Grotius than by Althusius. For Grotius, like his predecessors and many of his followers, starts from a personal authority and a personal right to authority (gained by conquest or alienation). Consequently, to establish a connection between the community and the prince they were forced to fall back upon such artificial distinctions as the "common subject" and the "special subject," or "real sovereignty" and "personal sovereignty."

In opposition to Althusius, who regarded the relation between sovereign authority and the community as indissoluble, Grotius recognizes the possibility of a separation, since the prince may establish his power by conquest and exercise it as in a patrimonial estate. In the history of political theory the gulf between the state or sovereign and the community grew ever wider, and the importance of the community and its organization for the explanation of sovereignty correspondingly diminished. The state is regarded only as a sovereign authority, a manifestation of power.

VII. *Political Theory as Exclusively a Theory of the Sovereign Authority.* The first writer who regards the state as exclusively an organization of powers is Hobbes. For him the sovereign is not a product ot the community; on the contrary, the community is a product of sovereign authority. Life in a state of nature has so great disadvantages for man that under the guidance of reason he unites with others to set up an irresistible authority to guarantee law, order, and security. According to Hobbes the social contract does not create a community (*civitas*) which, after it is in existence, subordinates itself to the authority and power of a prince or king by a contract which institutes a sovereign. The social contract itself directly establishes this supreme authority. Hobbes explains this by a clever device according to which the people agree among themselves that each shall give up all his rights to a single person or assembly on condition that the others shall do the same. "I authorize and give up my right of governing myself, to this man, or to this assembly of men, on this condition, that thou give up thy right to him, and authorize all his actions in like manner." [1]) When this is done, the state comes into existence. "This is the generation of that great Leviathan, or rather, to speak more reverently, of that *mortal god*, to which we owe under the *immortal God*, our peace and defence." [2])

In this case, then, we have to do with a contract in

[1]) *Leviathan*, Ch. XVII; English Works, Ed. Molesworth, Vol. III, p. 158.

[2]) *Ibid.*

favor of a third person. This third person, the king, receives nothing from the community, but on the contrary gets his rights and powers from each individual; he acquires these as the result of an agreement to this effect entered into by the individuals among themselves. He himself concludes no agreement with the individuals and has, therefore, no obligations toward them. The prince is not placed over against a community but over against individuals only. Thus for Hobbes the aphorism that the prince is "greater than the parts but less than the whole" has no meaning. If one speaks in this connection of a community at all, it can be only that which is produced by the establishment of the state. Hence Hobbes states a new conception of the community, that of a community produced by subordination to a single power; heretofore the point of departure had been the community, that is, an association of the people produced by law. In other words, the rise of the state occasions the rise of the community, but only in the sense that a portion of mankind is thereby brought into subjection to the same authority. Essentially the same idea is still current in the literature of German political theory. It probably occurred to Hobbes as a result of his residence in France where he was associated with the circle of the exiled Stuarts and where absolute monarchy had reached its highest point. In the case of France one might correctly hold at that time that the people, high and low, formed a unity only because of their complete subjection to the power of the king. France, with its separation into classes and its disjointed systems of local law,

was in no sense of the word a legal community. Consequently the notion of a community, as distinguished from the state, could scarcely make its way.

VIII. *The Relation between Sovereign Authority and the Organization of the Community in England.* The situation was different in England, where the existence of a common law pointed to an association of the people as distinguished from the political organization. Consequently Locke, who composed his *Two Treatises of Government* with the English situation in view, takes the association of the people as his point of departure. In its original condition, under the reign merely of the law of nature, this association has as its basis an incomplete organization, since many of its details are doubtful and there is no guarantee for its maintenance. This defect is removed by the establishment of a sovereign and consequently the task of the sovereign is *a priori* the realization of the law of nature. For Locke, therefore, the sovereign authority is an outgrowth of the community, but like his predecessors he fails to show that the organization of powers has its roots in the legal order of this community. It has its own independent basis, viz., the social contract. The state and the community are connected only in the sense that the former is a necessary complement of the latter, but not in the sense that political authority is an element of the legal order which grows out of the community and thus has the same basis as the law which rules in the community.

IX. *The German Philosophy of the State under the Ancien Régime.* The German philosophy of the state (Pufendorf, Thomasius, and Wolff) presents no new points of view for our purpose. How could one expect to find in it a derivation of the sovereign authority from that authority which upholds the organization of the community? The more than three hundred sovereigns under whom the German people groaned strove to make themselves independent of the Imperial power in order that they might establish themselves as sovereign over their subjects. A political theory such as that of Althusius stood in only too patent contradiction to the temper of the times. Hence it was that his work was forgotten until it was rediscovered by Gierke. German philosophy, both before and after Althusius, conceived its task as the establishment of sovereign authority independent of law, and it performed its task in the traditional fashion by constructing contracts whose binding force was established by appeal to the law of nature.

X. *Montesquieu's Separation of Powers: A Product of Political Theory as a Theory of Sovereign Authority.* The notion of the English constitutional system held by Montesquieu fitted admirably with the generally accepted theory of a sovereign authority resting upon an independent foundation. It is entirely clear why this system seemed to him to contain a separation of powers, for it was the general assumption of political theory that the state is nothing but a manifestation of force, a condition in which the people are subject to a sov-

ereign. The history of England had shown that in consequence the state involved a danger to freedom, which had resulted there in the placing of the king under "legal obligation" and had brought about a separation between the executive and legislative powers. When Montesquieu developed this practical safeguard against the abuse of power into a system, he declared that the wisdom of the English Constitution lay in the following discovery: "To prevent this abuse, it is necessary from the very nature of things that power should be a check to power." [1])

Hence the sovereign authority must be broken in pieces. The need for independently functioning legislative, executive, and judicial powers is involved in the idea of a sovereign authority standing outside the law, since the danger to freedom in such a situation must be guarded against. It is therefore intelligible that the theory of the separation of powers should have been counted a fundamental doctrine of constitutional law. And since it is customary even yet in political theory to describe the state as an original manifestation of power, this theory cannot free itself from the *trias politica*, though this trinity of powers is incompatible with the assumed unity of the state's authority.

As soon as the existence of a distinct sovereign authority is denied and the law is accepted as the only governing power, the power exercised in the name of the state is recognized as a competence, arising from the law and operating according to legal rules, to legislate, to render judgments, and to punish. It is the law,

[1]) *De l'esprit des lois*, Liv. XI, Ch. IV.

moreover, which determines whether the organs designed to fulfil these functions shall be more or less independent of each other. It may be that the independence of these organs coincides with the primitive functions of legislation, administration, and judicature, but it is not necessary for the organization of the state to follow these lines and, in fact, it has long since ceased in practice to do so. However, the need for this separation remains if the state is a Leviathan, or monster, which can thereby be rendered in some degree harmless. The famous doctrine of the *trias politica* is therefore inseparably connected with a particular theory of the state. If on the contrary one starts from the law, one sees at once that freedom does not need to be defended against the law as a governing power. One may search for means to insure the most satisfactory legislation possible, but the law established in this way is never a threatening authority, but rather a power whose validity depends upon its ethical character and which therefore can never be in principle injurious to freedom.

XI. *The Theory of State Sovereignty in the Eighteenth Century.* This line of reasoning assumes that the law as such carries its own validity with it and that it alone is to be regarded as a really governing power. But in the eighteenth century men were still far from this conclusion, at least on the Continent. For it was in just this period that the notion gained currency that the law, in respect to its validity if not its content, is the creation of the sovereign, a view which imputes to

the state that sovereign character in which even yet German political theory seeks to find its essence. In the age of enlightened despotism Germany put this notion into practice and law came to be regarded as the product of the state, the will of the sovereign, even though the sovereign is under an obligation to follow the prescriptions of the law of nature or reason. Nowhere, however, was this view so fully developed as in France at the time of the Revolution, where the dependence of law upon the state was erected into a dogma by means of the theory of popular sovereignty.

XII. *Rousseau's Popular Sovereignty.* The theory of popular sovereignty as held by Rousseau differed from the theory bearing the same name in the Middle Ages and later, because of its complete identification of the state with the community. For Rousseau the community (people) is the state. Previously the community and the state had been set over against each other; the people, as a community or *universitas*, had subordinated itself to the ruler by a *pactum subjectionis* and had thus constituted the state. But according to Rousseau the community (people) is an "organized body, living and like the body of a man," endowed with sovereignty over its members. The origin and legal basis for such an association he sought, like his predecessors, in the social contract, by which especially the sovereignty of the whole over its members was legitimized. With this idea of a community organized and acting as a person and possessing power over its members a new and fruitful idea was brought into the foreground of polit-

ical theory. For the first time the authority of an impersonal power is posited. Until the time of Rousseau it was impossible to conceive of any authority other than a personal one and the power of the state was regarded as a right to command inhering in specific persons. This personal authority Rousseau abandoned, for he assumed that the power of the state is nothing except the power of the community over its own members and hence an impersonal rulership which is inalienable. Thus every government is merely a "commission du peuple" which carries out a mandate revocable at any moment. In accordance with this view the community is recognized as having a will, the general will, in the production of which the members indeed have a share but which is not on that account to be identified with the will of all. This will of the social body is the positive law. In positive law the power of the community (people) over its members manifests itself and there is no authority higher than that of this law in which the will of the people is expressed. If Rousseau's political theory had been regarded only in the light of its main principles and had not been criticised exclusively with reference to what he borrowed from earlier theories, viz., the explanation of the community and the establishment of its sovereignty by the social contract, there might have been seen in it, what it doubtless contains, the principle of the modern idea of the state. This idea takes as its starting point, in order to explain the authority which is involved in the notion of the state, not an imaginary sovereign but the community. When one recognizes the community as the

central fact, one arrives naturally at the basis of the state's authority, namely, the law. For the community is an order which arises from the law, and in this order are rooted the structure, the functioning, and the competence of the whole organism which upholds the interests of the community. As will be shown later, it is perhaps inaccurate to call this complex of interests "the state."

In actual practice the old notion of sovereignty, however, still prevailed but was extended to the people; the view is still held that law is the will of the sovereign, which now means the will of the people. Consequently the theory of the autonomous character of legal authority could not take root and legislation was regarded as the only source of law. German political theory has been a blind follower of this practice, except in one respect, viz., that it substituted the concept of the *state* for the people, conceived the *state* as sovereignty or the manifestation of power, and regarded law as the will of the *state*, which makes law dependent upon power. Consequently Rousseau's words hold good of it also: "If force constitutes right, the effect changes with the cause, and any force which overcomes the first succeeds to its rights." [1]) This political theory does not trouble itself about the question, "What can render it [political subjection] legitimate?" [2])

XIII. *The Rise of the Modern Idea of the State under the Constitutional System.* What Rousseau's political theory could not accomplish, because it confused the au-

[1]) *Contrat social*, Liv. I, Ch. III.
[2]) *Ibid.*, Ch. I.

thority of the law with that of the sovereign and thus united ideas both old and new, was brought about by the actual practice of the constitutional system. In opposition to the old historical sovereign authority embodied in the king, it sets up an organ elected by and from the people, the representative assembly, thus bringing to light an authority other than that of the sovereign. If one still clings to the old terminology, the people (*universitas*, community) and the sovereign are still opposed, but no longer in the momentary act of establishing or limiting the rights of the sovereign by means of a contract; they are continuously opposed as permanent elements of the constitution. The king also is now viewed as an element of the constitution. Both practically and theoretically the importance of the new organ, as opposed to the old organ of sovereignty, was in the beginning uncertain. Should it be assumed, as von Mohl did, that decisive power remained with the old organ of sovereignty and that the popular assembly was to be regarded as an organ of the people, a source of information for the sovereign, but not an organ of the state? This notion very soon proved itself untenable, when the approval of the popular assembly was required for many acts of the sovereign. What other authority, not already belonging to the sovereign, was thus added to his decrees? Or is the sovereign authority to be regarded as divided between the king and the popular assembly? This, however, does not explain why it is precisely an organ of the *people* which is invested with sovereign authority. Yet this calls for explanation, since some participation of a popular assem-

bly in the fulfillment of the purposes of the state was considered an essential part of the constitutional system.

The development of the constitutional system clarified all these questions. At first this system takes the form of an application of the doctrine of the separation of powers, since among the tasks allotted to the popular assembly is that of limiting the authority of the sovereign in order to prevent abuses. This limitation took the form of a demand for legislative control. The word *legislation* (*Gesetz*) implies the notion of co-operation on the part of the popular assembly. Whatever requires the approval of the popular assembly is called *legislation*; this word therefore carries a formal meaning. There is no settled opinion and no settled practice regarding the extent of the co-operation of the popular assembly, or regarding what is and what is not to be settled by legislation. For changes in private law and criminal law legislation is required; for regulations which relate to the public welfare and the police, on the other hand, it is not required. In a revision of the constitution, therefore, occasion is taken expressly to extend the field of legislative control and so to limit the independent action of the sovereign in the interest of public safety.

In proportion as *legislative* regulations increase, the view develops that legislation is the *basis* for the sovereign's action and not merely a limitation upon his natural competence as a sovereign. With the appearance of this view the sovereign loses a part of his independence, for, in so far as he needs legislation as a

support, his character as a sovereign has been lost. This idea is fully realized in what is known as the "legal state" (*Rechtsstaat*). It logically implies that the co-operation of the popular assembly is a necessary condition without which the will of the sovereign cannot attain the standing of a *rule of law*. In this way, therefore, the word legislation, as determining the competence of the popular assembly, gains a *material* meaning. In assigning legislative authority to the king and the popular assembly it is no longer intended to designate organs which must co-operate in establishing the enactments called legislative; it is intended to assign rather a definite task, viz., that of making law. Thus it becomes clearly evident that the popular assembly functions as a *source of law*, while the sovereign also, where he retains a part of the legislative authority, acquires the character of an *organ of law* and can be considered as sovereign only with reference to this function. As soon as the idea of the sovereign is thus transformed and comes to consist, not in a right to command, but rather in the task of sharing in legislation, there appears the new idea of the state. This idea regards the rulership which inheres in the state as consisting exclusively in the imperative power of law and thus regards this rulership as existing wherever there is a rule of law, however made. This idea of the state first gains complete expression where either the republican or the parliamentary form of government has developed. Where, however, the king's right of sanction is still a living right, as (formerly) in Prussia, the old notion of sovereignty is not entirely displaced. For

this right of sanction can be regarded as the exercise of a subjective right to command, and frequently is so regarded. It is not, therefore, the function of an organ of law, a function standing on the same level as that of the popular assembly, as the modern idea of the state requires. The sole rulership of the law emerges only where law-making rests exclusively in the hands of the popular assembly, since the popular assembly gets its significance from what it represents, viz., the nation's sense of right. It is therefore the bearer of that spiritual power from which is derived the rulership and the imperative nature of law.

XIV. *The Supplanting of the Authority of the Sovereign by the Authority of the Law.* What has caused the idea of sovereignty, the idea of an independently valid right to command, to give way to the authority of the law? The answer to this question is to be found in the fact that, with the introduction of the constitutional system, the community recovered its own organ for law-making in the form of the popular assembly. It was just the loss of such an organ in the Middle Ages that made possible the rise of a sovereign authority standing upon its own foundation. It will not be denied that this authority, which reached its highest development in the monarchical form of government, played an important part in the lives of nations and that civilization was advanced through personal rulership. It is admitted also that such a personal authority lost its right to exist only when the people attained a stage of civilization in which a vital and powerful sense of right

among the citizens made itself continuously felt and did not merely break out sporadically in revolutions and reformations. We do not in the least deny that the notion of sovereignty has been justified; we hold merely that among civilized peoples it is now no longer recognized and that accordingly it must be expunged from political theory. Obviously the authority of the law is extending its field. Legal convictions are developing in lower and lower strata of the population and consequently the sense of right of whole classes must be more and more taken into account. Moreover, beyond the limits of national states a common sense of right is taking form and an international law is growing up which is wider in extent than ever before. An impersonal power is taking the place of a personal authority; a spiritual rulership in place of "sic volo sic jubeo." In this conception the modern idea of the state reaches its culmination, and it the authority of law is thus made supreme, this merely indicates the place which that authority has a right to claim by virtue of its real rulership. Thus the power which alone ruled the community in the age of the people's law again attains sole validity. The legal order of this original community did not owe its validity to the authority of a sovereign and the same is true in the vastly greater community of the present time. Between the two lie centuries in which the authority of the sovereign was opposed to the authority of law and in which we find political theory repeatedly attempting to establish a relationship between the two. The culmination of the sovereign's authority was reached in the eighteenth

century, when the authority of law lost its independence and law was regarded as the will of the sovereign. Since the French Revolution, when a legislative organ begins to be active in the community, a change has taken place. Step by step this organ has succeeded in re-establishing the validity of law as against the sovereign. Political theory finds itself confronted again with a dualism of authorities until, under the theory and practice of the legal state, this dualism is removed and the sole rulership is again assigned to law.

Political theory must now concern itself primarily with making clear the basis of this rulership.

CHAPTER III

THE BASIS OF THE BINDING FORCE OF LAW

I. *The Concept of the Sovereignty of Law.* The theory of the sovereignty of law may be taken either as a description of an actually existing condition or as a principle the realization of which ought to be striven for.

If the phrase is used in the sense of a theory which generally controls practice, it is applicable only where there is no other authority than that of the law which is actually in force. In particular, it would not apply where there is a sovereign having an authority independent of the law. It is quite otherwise, however, if the theory refers to some one's idealization of the law. In this case the theory involves an effort to realize this "just" law as far as possible and thus to constitute the state in such a way as to realize the idea of justice. This second sense in which the theory may be understood assumes that the condition implied in the first meaning has already been realized and that as a result power springs from the positive law and not from a sovereign. After power has thus been made to depend solely upon positive law, the next step in the development of the state is to improve the content of the law as much as possible.

Consequently, a careful distinction between law (*Recht*) and justice (*Gerechtigkeit*) is as important for

the theory of the sovereignty of law as for jurisprudence. Usage is uncertain, especially with reference to the word *law* (*Recht*), which is not always used in contradistinction to *justice* (*Gerechtigkeit*) but sometimes as synomymous with it. When, for example, one speaks of a conflict with law or right (*Recht*), he can be understood to mean either a conflict with effective legal rules or with the idea of justice. It is necessary at the start, therefore, to insist that in investigating the basis of the binding force of law, this word *law* (*Recht*) is taken to mean the totality of effective legal rules. Accordingly, the question whether these rules really embody justice, — whether the standard applied in promulgating or establishing them was the just one, — need not be considered. Though the will of the legislator may be a sufficient reason for our accepting legal rules as having binding force, there is always the possibility of showing that the standard applied by the legislator does not correspond, or only partly corresponds, with the idea of justice. The investigation of this standard is not our task, but rather that of legal philosophy. We must keep our eyes fixed solely upon the law which is in force.

But when can one speak of law which is in force? In principle this raises the same question as that which came up earlier regarding the authority of the sovereign, viz., Whence comes the sovereign's right to rule? Why is he able to exercise an authority which citizens are bound to obey? So long as the authority of the sovereign was taken as the starting point, the basis of this authority was sought either in the will of God or in

an original social compact or compact with the sovereign, or in the natural power of the strong over the weak. The theory of the sovereignty of law, on the other hand, takes account only of that basis for authority which it finds in the spiritual life of man, and specifically in that part of this spiritual life which operates in us as a feeling or sense of right. The law which is in force, therefore, includes every general or special rule, whether written or unwritten, which springs from men's feeling or sense of right. For the theory of the sovereignty of law, the basis of authority lies in an internal force, and not in an external title as it does for the theory of state sovereignty. No judgment is passed upon the content of the specific rules emanating from this power. The sense of right as it actually reveals itself, with all its defects, is recognized as the original source of authority.

The sovereignty of law can be regarded either as a record of what is already real or as a state of affairs which ought to be realized. The reality corresponds to the theory if the sense of right of the members of the community is unrestrained in its operation and if all rights and powers proceed solely therefrom. The theory has not been realized, or has not been completely realized, if any authority independent of the law is able to assert itself successfully. In the latter case, the idea of sovereignty, implying the natural subjection of the people to such an authority, still remains active. On the whole, it may be said that the theory of the sovereignty of law has gained supremacy in the practice of the western European states. In the eastern states,

especially in Germany, Austria, and Hungary, this is (or was) not entirely the case; consequently in these countries the notion of a sovereign authority standing outside the law, though more or less limited by law, still lies at the basis of political theory. Where this notion persists in practice there is a dual authority, the untenableness of which I have tried to show in my *Lehre der Rechtssouveränität.* The original contribution of the theory of the sovereignty of law, however, was not primarily the elimination of the twofold authority of sovereign and of law. Unity might be attained, and indeed actually was attained in the eighteenth century, by deriving the authority of law from the authority of the sovereign. The originality of the theory lies rather in the fact that *it has brought within the law what previously has always been outside it.* The unsubstantial nature of the sovereign's authority and its lack of any real foundation made it necessary to examine the basis of any and all authority. And when actual practice was carefully examined, it was evident that the law, the positively established law, had to be recognized not only as the source of the rights and obligations of citizens, but also as the basis of the so-called rights of the sovereign or, if one prefers, of the constituted powers of government. After the introduction of the representative system this view gradually gained acceptance. It clothed itself in the theory of the legal state (*Rechtsstaat*) from which the theory of the sovereignty of law had only to draw the necessary conclusions.

But after the law came to be recognized as the basis of all private rights and governmental powers, it be-

came necessary to consider also how a rule might get the quality of law, that is, how it came to have binding force. It was no longer enough to refer to the various abstract personalities behind which the old notion of sovereignty had sheltered itself, such as the state, the legislature, the people, or the parliament. It was necessary to discover a sovereign having the highest degree of reality. The task was made easier by the fact that the investigation coincided with the new movement in the field of jurisprudence which denied the identity of statutory law (*Gesetz*) with law in general (*Recht*) and which called into existence the so-called Free School of Law. This School also was interested in the basis of the validity of law. From the efforts of the two movements a first step was taken on the road to a realistic theory of the state and of law. The view developed that the main support of law and of the binding force of its rules lies not outside man but within him and specifically in his spiritual life as this reveals itself in his feeling and sense of right.

II. *The Authority of Law as the Rulership of Will.* However, before we attempt to define more exactly the basis of law indicated above, we must consider two other theories of the binding authority of law. This authority has been derived either from the wills of the individuals subject to the law or from the will of a ruler who is conceived as sovereign. The first of these theories is most definitely stated by Grotius, who derives the community and consequently also the law from a compact between the members of society. In no other

manner, he maintains, can the binding force of the actually existing law be established. "For some mode of obliging themselves was necessary among men, and no other natural mode could be imagined." [1]) If we ask where, in turn, the compact gets its binding force, the answer is natural law with its requirement of "observing compacts." This compact is attested by entrance into the community; by this act, it is assumed, the individual has expressly or tacitly consented to the authority of the rules which spring directly or indirectly from the community. "For those who had joined any community, or put themselves in subjection to any man or men, either expressly promised, or from the nature of the case must have been understood to promise tacitly, that they would conform to that which either the majority of the community, or those to whom the power was assigned, should determine." [2])

Rousseau constructed his theory of popular sovereignty upon this idea and, as Kelsen rightly observes in his *Hauptprobleme der Staatsrechtslehre*, it frequently appears even to-day in legal and political theory. It may be seen particularly in Bierling, whose "recognition theory" agrees in its fundamental idea with the contract theory, since he founds the binding force of law upon its acceptance by the individual members of society. In the formulation of many statutory provisions the same notion is occasionally encountered, as when such a phrase as "they bind themselves" is employed. The implication is that it is the human will and

[1]) *De jure belli ac pacis*, Prolegomena, Sect. 15.
[2]) *Ibid.*

not the law which binds. Sometimes also the human will serves as the basis of law, for example, in the explanation of provisions relating to intestate succession and the so-called dispositive law.

Opposed to the conception that the binding force of law is derived from the will of the *individual* is the view which traces it back directly to the *sovereign authority*. According to the latter view, the sovereign is not set up by individuals but is either a divine institution or inherent in nature along with the community (the Catholic point of view). The authority of the sovereign, therefore, is ultimate and from it springs the validity of law.

Both these theories have this in common, that they take the will as the basis of the binding force of law. In the first case it is the will of the individual; in the second it is the will of the sovereign. In the first, the foundation of law is sought in man; in the second, it is sought outside him.

When the binding force of law is derived from an ultimate sovereign authority, the *objective* validity of law is most definitely asserted. It does not matter whether the rules retain any connection with the spiritual life of the individual; the law is valid merely because it is the will of the sovereign. The spiritual life of the people who chance to be subject to such a sovereign and whose lives are necessarily affected by these rules counts in principle for nothing against the will of the sovereign. The sovereign may take account of the popular feeling and sense of right, and indeed is likely to do so from motives of expediency, perhaps in

order to counteract resistance and to secure a voluntary obedience to his decrees; but in principle the rules which the sovereign establishes possess an entirely independent validity.

The other view, which rests the validity of legal rules upon the will of the individual, robs the law of all objectivity. If the rule is effective, it is valid; otherwise not. But according to this view the spiritual content of the rule attains its rightful place. A legal rule aims to control the spiritual life of the individual and the theory in question supplies the conditions of this control by establishing a harmony between that life and the rules.

III. *Criticism of the Rulership of Will.* Neither of these two views can be maintained. The latter is untenable because the law, which has for its purpose the control of the human will, cannot derive its binding force from that will. The harmony which this view was said to establish is not one between the individual's sense of right and the content of the rule, but a harmony between his will and the rule. Thus the law loses its normative character; it completely forfeits its objectivity and stands in conflict with reality.

The other view is untenable because there is not in reality a sovereign endowed with a subjective right to command. In the titles of king and emperor tradition and history may still prolong the fiction of a personal authority, just as this fiction still finds a place in orthodox theology, which uses such an authority for its dogmatic purposes. But as a matter of fact we are no

longer able to recognize any man as endowed with the right to exact obedience. Nor is there to-day any Jacobin who believes that a right to obedience ought to be attributed to the people. Moreover, upon rational grounds it can be proved that the right is an impossibility, since the possessor of such a right is not a living being but merely an idea. The notion that the state is the possessor of authority has persisted longest. But that this conception also lacks reality is proved by the inability of the German school to maintain it in the face of actual practice and in the face of the theory of the legal state, which also subordinates the state to law.

IV. *The Conditions for the Validity of Law.* In spite of the untenableness of both these explanations of the validity of law, the insight into the meaning of law which each presents from its own point of view retains its value. So far as the law is thought of as a rule it must necessarily satisfy two conditions. In the first place, it must depend for its validity upon a power standing outside human will and thus possess objectivity with reference to this will. In the second place, since law has for its purpose the determination of conduct, the content of its rules must accord with the spiritual nature of the men to whom it is to be applied.

V. *The Basis of Legal Rules.* These two fundamental conditions, which hold for every rule, are entirely satisfied by the theory of legal obligation defended in this work. It takes the spiritual nature of man as its point of departure. And of the many human feelings, some

of which are more developed and some less, it emphasizes one, viz., the feeling for right (*Rechtsgefühl*). This feeling, — including as its less developed form the instinct for right (*Rechtsinstinkt*) and as its more developed form the sense of right (*Rechtsbewusstsein*), — is as effective among men as the moral, the aesthetic, and the religious sense, to say nothing of other feelings such as love and friendship. This feeling for right, like the other feelings, in no sense owes its existence to the human will and in its operations it is independent of the will. It is more in evidence in some individuals than in others, but it may safely be considered a natural and universal human impulse. It is not necessary to inquire here whether it is an ultimate and irreducible part of human nature (as we should ourselves be inclined to hold) nor to fix accurately the boundaries between it and the other mental faculties, such as the moral sense. It is sufficient for our purposes to have established the fact that this feeling for right is a universal human impulse which calls forth a specific reaction with respect to our own behavior and that of other men. The rules which originate from *this* reaction are rules of right or law; they have objective validity also against the will of the individual whose sense of right is taken as standard, for the feeling of right is independent of will.

The law, therefore, is the manifestation of one of the countless valuations which we make as a result of our mental capacities. We subject to our judgment all human behavior, and indeed the whole of reality, and we can distinguish as many kinds of norms as there are

standards used in the process. It is not a matter of choice whether we shall recognize these norms or not; we cannot act indifferently to them by force of will. Our inner nature reacts with or without the will, and we feel ourselves subject to anything which, as a result of this reaction, we judge to be good, beautiful, or right. It is this tendency of human nature to bestow and recognize values which defines for us the world of norms and which gives these norms their power. Consequently the authority of law also is to be sought in the reaction of the feeling for right. This authority therefore lies within man and not outside him.

On this natural mental faculty rests the validity of all law. There are no sources of law, as the textbooks teach; there is only *one* source of law, viz., the feeling or sense of right which resides in man and has a place in his conscious life, like all the other tendencies that give rise to judgments of value. Upon this all law is based, whether it be positive law, customary law, or the unwritten law in general. A statute which does not rest upon this foundation is not law; it lacks validity even though it be obeyed voluntarily or by compulsion. It must be recognized, therefore, that there may be provisions of positive law which lack real legal quality. The legislative organ runs the risk of enacting rules which lack the quality of law either because the organization of the legislature is defective or because it mistakes what the people's sense of right demands. On the other hand, it may happen even more easily that what is embodied in a statute ceases to be law and so is no longer valid because it has lost the basis of its

binding force. In such a case compulsion, — the punishment or legal judgment which disobedience to the statute entails, — is irrelevant. Constraint is justified by the necessity of maintaining the law but it can never bestow legal quality upon a rule which lacks it. Mere force, whether organized as in the state or unorganized as in an insurrection or revolution, can never give to a rule that *ethical* element which belongs essentially to a rule of law. On the contrary, constraint can gain an ethical quality only when used in the service of law. Thus the rule must have the definite character of law and it can derive this only from the feeling or sense of right which is rooted by nature in the human mind.

This conclusion regarding the binding force of law is not drawn from a general view of life or from a system of philosophy but is forced upon us by actual experience. We shall have occasion to show this repeatedly and we may therefore content ourselves for the present with pointing out a twofold consideration. In the first place, as time goes on the communal life of nations is more and more controlled by their sense of right. The influence of the sense of right as a social phenomenon is obvious to everyone, as well as the decline of the supremacy of various agencies of power, especially those of sovereignty. The spiritual life daily gains greater strength as the obstructions fall away which impeded the development of associations based upon it. And as these associations gain strength and broaden into relationships between the peoples of different states, there grows up a world consciousness which guides the fate of mankind.

In the second place, and very closely connected with this momentous fact, the communal life cannot exist without a sense of duty among the citizens. Turn the question as one will, the sense of right is intrinsically a power which creates obligations. In order to uphold the duty of obedience to a sovereign one must take refuge in dogmas or empty fictions, which have been imparted to men by tradition or by scholastic instruction. These maintain a precarious existence and have never shown themselves capable of permanent influence. The sense of duty, on the contrary, is an original force in human life whose reality we experience daily. This fact sheds a copious light upon the existence and development of law and upon the communal life which arises from it.

We are therefore convinced that in basing the validity of law upon the sense of right we stand upon the firm foundation of fact. Only by establishing the authority of law in this manner, moreover, can full account be taken of the *ethical* character of law. The keynote of the legal order has an entirely different tone when it is understood as essentially a moral force rather than as a rulership imposed upon us and having nothing to do with our own inner life, as something to be taken advantage of occasionally to further our own interests and to injure other persons' interests. The Positive School of Law is to blame for the fact that this base way of regarding law is still dominant in practice, or perhaps we may say it *was*. From it proceed those elaborate artifices by which the judge promulgates a law whose worth has never been tested. Enough

has already been said about this way of creating law and about its results, which are entirely divorced from all relation with the spiritual life. If this mode of law-making has now been discarded, this is due to the realization that the authority of law can be derived only from the human feeling and sense of right. This spiritual basis requires a continual testing of the law when its administration is in question, but not a testing merely by the standards of a sense of right gained from legal philosophy. As we have said, the theory of the sovereignty of law may set itself the problem of determining what is just law, but here we are dealing primarily with a theory arising from the actual practice of jurisprudence. Hence the question to be answered is: What is the basis of the binding force of *positive* law? If in answering this question we appeal to the sense of right, this is understood to mean the idea of justice, manifesting itself in statutes or ordinances, in custom, or in unwritten law, directly applied to the solution of concrete conflicts of interests. To a philosopher or to any outsider the law thus declared may not appear to be just. The door must be kept wide open to criticism and above all we must avoid undervaluing an act done contrary to positive law but in accord with a higher standard of right. Both are indispensable conditions of the development of law. But all this lies outside positive law. If the validity of this positive law is derived from the human sense of right, this means the sense which lies at the basis of the communal life as this life is actually lived. It is of course possible, owing to the influence of numerous factors both material and ideal

and because of an imperfect insight into the nature of the interests to be evaluated by law, that this sense of right may be different now from what it formerly was, just as it may vary in different individuals under the pressure of divergent experiences and interests. We have to deal with this more or less imperfect sense of right. Its activity produces rules and imparts to them the character of positive rules of law. Hence the correctness of Stammler's adage, "All positive law is an attempt at just law." [1]) Practice must content itself with a legal system whose rules are based upon a defective sense of right, that is, a sense of right which is more or less encumbered in the members of the community.

If a higher justice is to be evolved, the legal instruction of the people must be undertaken. But one cannot exclude the sense of right of any individual who is in a position to share in the spiritual life of his time. The only restriction involved in the theory of the sense of right lies in the fact that the operation of this sense must be confined within its natural boundaries, that is, it must take part in law-making only for those interests which the members of the community understand. If they are required to decide upon the legal value of interests about which they have no knowledge, their minds are compelled to react upon phenomena from which they have experienced no effects. The exclusion of such persons from law-making cannot be taken as denying that the sense of right is the basis of law. We shall return to this important point when we take up the quality of the sense of right.

[1]) *Die Lehre von dem richtigen Recht*, 1902, p. 31.

VI. *Objections to the Theory.* It is remarkable that it is so difficult for many persons to accept the sense or feeling of right as the basis of positive law. History, even that of the present time, daily attests the strength of this feeling. It gives rise to revolts and revolutions; it overthrows well-established dynasties and sets up democracies; it changes the meaning of statutes and constitutions; it purifies a tainted political atmosphere like a thunder storm. And yet it is assumed that the legal order within which an entire people conducts its ordinary affairs from day to day has no need of this spiritual power to establish its validity. To us this is incomprehensible. It might perhaps be intelligible if the acceptance of this power as the basis of practical legal relations were connected with a particular system of philosophy, a religious creed, or a political conviction. But how can this be the case when the theory is derived from facts which no one denies?

We have been able to discover only a few reasons which to some extent explain the opposition to our view, which may be called the theory of the sense of right.

A. *The Normative Character of the Sense of Right.* The first reason lies in an extraordinary misunderstanding of the meaning which the sense of right has for human life. Several of our opponents believe that it is necessary to deny all normative character to the sense of right. It may indeed be a valuable element of the mind but it carries with it no compulsion to action and judgment. Hence there must be a rule arising from some other source requiring us to act and judge according to our sense of right.

This discovery, at least in Holland, was made by Professor Struycken. He says [1]): If we ask "why this instinct, or feeling, or sense of right, whether in general or in a particular era of civilization, has the force of law, we find only a few high-sounding phrases, such as 'natural impulse', 'spiritual power', 'impersonal force', 'mental faculty', 'ethical force', etc., but to the question itself, the fundamental question, there is no answer." And a little later we find these remarkable words: "Only the rule, 'Act always as your sense of right prescribes,' would stamp the content of the sense of right as a *norm*, but this rule would be a maxim imposed upon the individual from without. Such a maxim has so little to do with the sense of right itself, considered as a mental phenomenon, that no one thinks of complying with it. No reasonable man will always permit his conduct to be governed by his feeling or sense of right." [2]) Other Dutch jurists, like Professor de Savornin Lohman and Professor Anema, agree with the view expressed in this quotation. The former expresses it even more emphatically in the statement that the sense of right is merely the psychological process from which the law arises; this psychological process, he says, is then represented as a reason why the law is ethically binding upon us. For Professor Anema also the feeling for right is a dead thing which must get its normative force from some other source. He says: "If a rule independent of my will arises from my feeling for right, I am not bound by it." And in another place,

[1]) *Recht en Gezag*, 1916, p. 20.
[2]) *Ibid.*, p. 25.

"No one considers himself bound by his own sense of right."

Let us carry somewhat farther the logical consequences of this point of view. The idea at the bottom of it is that among other experiences and feelings in our consciousness there occur those of right and wrong. These form a particular kind of state of mind which we experience. They can and do influence our action and judgment. But by what sensations or feelings we *ought* to be controlled depends, according to the view of the writers mentioned, not upon the nature of these sensations, but upon something else, upon an ethical rule, which obligates us to act in accord with our sense of justice. It is a logical deduction from this reasoning, however, that we cannot stop at this ethical rule. What is called an ethical rule is itself a sensation in accord with which we ought to act. Morality does not contain the power to make its own commands obligatory but there is a rule outside it which obligates us to act and judge according to our moral feelings. Now suppose we succeed in finding this rule, say in religion. Then the normative character of religious feeling would in turn lie outside this feeling itself; it would arise from another rule obligating us to live according to religious feeling. We cannot see where this heaping up of rules would stop, each rule giving normative character to its immediate predecessor. Professor Struycken says nothing about it, perhaps because he too cannot see. Until some light is thrown upon this endless succession of rules, we shall exercise our right to regard it as a curiosity introduced into the discussion by sheer phantasy.

Our own assumption, on the contrary, which is discussed by Heymans, [1]) Lipps, [2]) Hensel, [3]) and Windelband, [4]) is based upon a fact of common experience, viz., that among the feelings which make up the content of our consciousness, some are intrinsically normative and therefore present themselves to us as imposing obligations to judge, think, and act in accord with them. The sense of right, then, is a psychological fact, but a fact of a particular kind, like the feeling for beauty, the moral sense, the consciousness of truth, and religious feeling. What criterion, whether conscious or unconscious, is applied in each of these cases, and what part of life is controlled by each of these sensations or feelings, might be investigated at length, but their primary quality is simply the fact that they are obligatory. Lipps's remark with reference to moral claims, — that we feel ourselves unconditionally obliged by them and are therefore driven to realize them, — is especially applicable to the feeling for right. It is obvious that something of the nature of justice governs our consciousness. That this idea of justice is something more than a mere matter for contemplation, that it actuates our doing and forbearing with obligatory force, is shown by a thousand common experiences the effects of which we observe in ourselves and others. Is this fact really unknown to our opponents? If they see in the operation of the idea of justice nothing more than a motive of action and judgment "on the same level"

[1]) *Einführung in die Ethik*, 1914, p. 28.
[2]) *Die ethischen Grundfragen*, 1905, p. 92.
[3]) *Hauptprobleme der Ethik*, 1913.
[4]) *Präludien*, Ed. 5, 1915, Vol. II, p. 85.

with all other motives, they reduce human life to a puppet-show. But we know, and in the end they know too, that life contradicts such a view. We subordinate life to honor, the care of our private interests to justice, our social success to truth, our individuality to love, our peace to the worship of God, our physical enjoyment to the creation of beauty. In all these respects "objective values" are effective; all belong to the realm of *duty*. Any sense of duty is an emanation from the Absolute. But our opponents hold the singular view that this Absolute, in order to have validity for men, must be joined with a special admonition to live up to it. Hence they quite fail to see that a conscious experience may possess an inherent obligatory force. Thus they are led to the absurdity that an individual is not bound by his sense of right, because the latter is a mental phenomenon and "stands on the same level" with other motives!

B. *The Authority of the Sovereign as the Authority of Law.* In all the criticism which has heretofore been showered upon the theory of legal sovereignty, there is nothing which goes to the roots of the explanation which it gives of the basis of our positive legal order. On the contrary, the adherents of that theory have every reason to complain that the dualism of legal authority and sovereign authority has been maintained as if there were not the slightest difficulty in its way. The question is not, as has been urged against us, whether in earlier political theory and practice the sovereign was regarded as an independent source of authority. No one can deny this fact. For our own part, we

have not only admitted it but have pointed out the advantages which this idea carried with it. The question, however, is whether the view is tenable. Earlier generations framed a conception of the source of authority which made it necessary to admit a sovereign acting independently of the law. So much is not open to question. The point raised by those who defend the theory of legal sovereignty is whether this view was correct. The notion of sovereignty or of authority is exactly like the idea of God. Would it occur to anyone to adhere without criticism to the idea of God under the dominion of which earlier generations have lived? Yet who will deny that the concept of God, even in its anthropomorphic forms, has been an important ideal force, though for many persons it has now been purified of these elements? The theory of the sovereignty of law will assert no more in its own field. For this God of an earlier time, this sovereign who issues his commands and makes and unmakes law, we have no further use. Reflection upon the course of affairs has revealed another God, a spiritual God, who in this spiritualized form exerts a rulership over us far more real than that contained in the idea of natural subordination to any sovereign endowed with fictitious authority. Authority as we now experience it, and as we perceive it more clearly day by day, is fixed in our spiritual life. From this life arises judgment about right and wrong. From it arises a majesty of authority which needs no borrowed luster in order to gain acceptance. How far removed men are from understanding this new theory is seen most clearly from an objection urged against it, viz.,

that even when personal authority was in control it did not lack a legal title. "This personal authority was able for centuries to gain acceptance as law; the commands and rules promulgated by it were accepted as the legally established order, and many of these rules have retained their legal force to the present time. Here is to be found in its highest perfection that positive, historical legal title which has been sought." We ask again whether what was accepted for centuries *as* law is still recognized as *law*. That is the main point in the new theory. The farther back we go in the life of the community, the more primitive become the ideas of law. We have not gone farther back than the period when the absolute monarchy rose and flourished, and we encounter at that time the idea of a sovereign endowed with original power and possessed of a competence outside the law of issuing commands to his subjects with reference to their social behavior. Let us assume for a moment that this constitutes a "legally established order for the community." Are we thereby committed to this theory for all time? The way in which the state was conceived at that time is very different from the way in which it is conceived at present. In particular, men's minds were then wholly occupied with the organization of power and this was looked upon as the essential attribute of the state. At the present time, on the other hand, as the result of an insight gained from the actual course of affairs, the state is conceived to be essentially a system of legal relations existing within the community. But if we start from this empirical fact, we must inquire whether a "legally established

order of the community," as this phrase was understood when the idea of sovereignty prevailed, is still an adequate description of the altered reality. Does it still apply to a situation in which there is neither a sovereign endowed with original authority nor a natural subjection of the people to such a sovereign? The theory of the sovereignty of law answers this question in the negative. It cannot rest content with an "historical legal title" when the history of such a title has come to an end. Rather it takes the entire reality into account and maintains that now the "legally established order" has a different basis from that which was supposed to be necessary so long as men were dominated by the notion of sovereignty. To explain this *different basis* and so to make clear the modern idea of the state is the task of the theory of legal sovereignty.

To discover this different basis no speculative considerations were needed and no investigations into the philosophy of law. It was the actual course of affairs, real life, which showed us the basis for the rulership of law. It came to be perceived that the legislator no longer had a monopoly of law-making. Besides the statutory law and set over against it, there was an independent legal order which had come into control of many of the relations of life. Jurisprudence was forced to consider the basis of this legal order and this basis could be found only in the feeling for right which exists among the citizens. After this was established the same basis had to be accepted to explain the rulership of statutory law, because the authority of the legislator as such has no foundation. Moreover, a twofold authority, a

dualism of two kinds of law independent and opposed to each other, would be intolerable, even if it were not logically inconsistent. Thus a common source was found for all law, however it might originate. This result led us into the realm of psychology, from which the theory of legal sovereignty adopts the view that the sense of right is ultimate. [1]) The whole legal order under which we live is thus traced back to the operation of this component of the mental life. This view in no way excludes criticism or evaluation of the content of this legal order. We must guard against the error of the theory of natural law, which neglected the complexity of human nature and reduced man to a purely legal entity. What appears at a given time as a legal rule may perhaps be the result of an inadequate knowledge of the interests concerned or of prejudice in favor of special interests. A better knowledge of the former or a lessened emphasis upon the latter might have led to a different decision. Moreover, we do not hold that a mere reference to the feeling for right enables us to dispense with the search for the ultimate criterion of right. To clarify this point an exhaustive study, based primarily upon experience, is needed. Perhaps the outcome of such a study will oblige us to accept Struycken's solution, which he offers however without any explanation, that the matter will be cleared up when we know "the ultimate destiny of human life." A modest task! This is merely to say that jurisprudence is confronted with a field for investigation which is as yet immeasurable. It means also that this investigation

[1]) Kranenburg, *Tijdschrift voor Wijsbegeerte*, 1914.

must open up to us other and higher roads than those which fall within the ken of the Positive School of Law, which regards the law as scarcely more than a toy for jurists. However, in the actual course of the social life we must get along once for all with the judgments of a more or less imperfect sense of right. About the sense ot right as a fundamental premise there is no room for further discussion; it is the only premise which posesses the virtue of reality. We may regret the limitations of our mental horizon; we may regard it as a pressing duty for ourselves and others to furthei legal instruction; we shall try to establish legal institutions which permit the sense of right of every man to cooperate in evaluating the interests which lie within the circle of his understanding. Under no circumstances, however, can we divorce ourselves from the sense of right as it actually exists.

C. *The Stability of Law.* This brings us to the third difficulty which prevents many from accepting the theory of the sovereignty of law. We can make no use of your principle, so the argument runs, because it makes the law unstable. This statement, however, is in a high degree misleading. The law has inevitably a content of changeable value, and one cannot ask that that should be immutable which by nature lacks fixity. And if one appeals to the value which the sense of right attaches to a more or less unchangeable law, one is involved in a fundamental contradiction. By this means one succeeds only in preserving a rule which is no longer a rule of law. Stability of *law* is a contradiction; only stability of *rules* can be attained. That fixed rules

owe their legal character to their fixity is nonsense and will be maintained by no one. If then this legal character depends upon something else which is by nature changeable, one must take the law as it is with all its changeableness. It is scarcely necessary to remind the reader that an exaggerated idea has been formed of this changeableness. If we compare law founded upon a sovereign authority with that founded upon the sense of right, the comparison will certainly not be unfavorable to the stability of the latter. For law founded upon sovereignty requires continual development which must be brought about by appeals to history, to its original purpose, to the exact meaning of words, and to logical deductions. As experience shows, the product of this complication of interpretative machinery cannot be foreseen. On the other hand, law which is based upon the sense of right is developed by an evaluation of interests, and in this process the single decisive factor lies quite outside the realm of dialectic; the decisive factor is the sense of right which is dominant in the circle to which the interested parties belong.

After all, a greater or less stability of content makes no difference in principle. As a theory of religion cannot be evaluated by its contribution to a beneficent spiritual peace, so a basis of law cannot be chosen with a view to making the content of law easy to discover. Such a choice must be made only upon the ground of truth. And the theory of sovereignty as a basis for law has no truth. Law marked by absolute stability could be secured only if we had a legal pope over us. To be sure, this would cut off a valuable element of men's

mental life, for the sense of right would be rendered useless. But it would make it possible in all cases to fix *ex cathedra* the limits within which social life must move. In default of believers no such legal pope is at our disposal. But faith does exist in a being possessing far narrower authority and thus we find in legal and political theory a sort of pope. He is impotent, however, because he merely gets the credit for what outside forces have brought about, just as all the functions of the state are performed in the name of a constitutional monarch. This pope is the sovereign. Whoever cannot free himself from a belief in this automaton, which always reflects what others have put into it, is cherishing unrealities and rejecting the truth. Like all other norms, the law must anchor itself in the human spirit. Whoever believes that he can dispense with this basis for its rulership is deceiving himself. And anyone who postulates sovereignty in order to preserve the stability of the law is introducing into the concept of law elements which weaken the binding force of its rules and which therefore ought never to be used in the framing of any hypothesis. When one asks for *stability* in a rule regardless of its content as a principle of right, one is demanding something that can be secured only at the cost of its legal character. The degree of its stability is subordinate to its being based upon a principle of right. Whoever asks for a greater stability denies this basis.

D. *Force and Law.* Still a fourth cause of the opposition encountered by the theory of legal sovereignty may be indicated. It is objected that this theory is one-sided because it deals only with right, while the

factor of force must also be taken into account. The essential character of law, says Professor Paul Scholten, lies in its twofold nature as ideal *and* fact, rule *and* force, a phase of the subject which is entirely misconceived by the theory of legal sovereignty. Professor de Savornin Lohman also emphasizes the same point. He starts, however, from the state and says that a theory to explain the state "must take account of both elements, that of force and that of law."

We can answer this objection only by referring to the criticism to which we have repeatedly subjected this dualism of law and force. The main point, we believe, has received sufficient emphasis. In the first place, however, we must call attention to a confusion of two lines of thought which occurs when it is said, "There is a dualism of force and law, just as in the individual there exist side by side the sense of power and the sense of right." The fact that consciousness includes other feelings besides the idea of justice, such as the desire for power, may be admitted without further argument. Indeed, we have repeatedly emphasized this fact in the previous discussion, where we spoke of the factors which interfere with the operation of the idea of justice. We have noted also the means by which this disturbing element can be eliminated, either wholly or in part. But the more or less correct analysis of our mental life has nothing to do with the essence of the theory of legal sovereignty. This consists in the view that no authority outside the law can be recognized as lawful and therefore no *duty* to obey can arise except from a rule of *law*. No one can fail to perceive that

social relations are often determined by physical force, exercised either spontaneously by the individual or with the aid of the police, and also by mental forces which generally presuppose a background of physical forces. Our theory in no way denies this. It merely denies that, in the light of the existing notions of law and of the state, there ought to be a place for a sovereign exercising authority in the enforcement of executions and the infliction of punishment, and in relation to whom the people are in a state of subjection, while at the same time there is another kind of subjection established by law. This is the dualism to which the theory of legal sovereignty objects, not primarily because it is a dualism but because it is now perceived that a natural relation of subjection to a sovereign is nothing but a fiction, because the conception of sovereignty is merely a logical construction which does not correspond to reality, because the basis of sovereign authority can nowhere be pointed out, and because a duty to obey, without which society would fall to pieces, cannot be derived in this way from actual facts nor indeed be accepted as an hypothesis. This negative side of the theory of legal sovereignty is not contested by any of its critics. But the objection made against its positive side, especially by Professor Anema, is unjust. He says: "If he [the author of the present work] identifies this opposition [between the sovereign and law] with that between force and law, and if he then holds that formerly everything was wrong and now everything is right, he commits a serious injustice." The theory of legal sovereignty has never been guilty

of this injustice. It has emphasized the fact that according to earlier views the entire organization of governmental powers had its own foundation and was not a product of the legal order of the community. We have now attained a different understanding of this matter, since we have raised the question of the legal title of the sovereign authority. It has become clear that none of the titles which have usually been assumed can establish an obligation to obey and that accordingly the sovereign authority has no basis of its own. On the other hand, this is not the case if law is regarded as the source of all authority. This is not to say, and no defender of the theory has said, that "formerly everything was wrong and now everything is right." It means merely that former views about the authority of the sovereign cannot be accepted any longer. The case is precisely like the institution of slavery, the law of tithes, and the like, which were once universally regarded as legal institutions, but which are now no longer so regarded.

It is equally an error to suppose that the theory of legal sovereignty is bound to solve the opposition between force and law. No one denies that force as well as law has had a share in shaping social life. Nor is it denied that law has frequently been developed by the use of force and by authority, or that it still develops in this way. This is shown not only in revolutions but also in the use of law itself to exert compulsion, as happens for example in the case of obstructive tactics in parliamentary bodies, in strikes, and the like. It may turn out in the end that force so applied is justified because it tends to the development of the legal order,

even though it is more or less a breach of the peace. On the other hand, it must be insisted that in an increasing degree the law organizes its own means of development and that, as time goes on, it stands less and less in need of an authority outside itself to bring this development about. After an organization for law-making has been perfected, and especially after the decentralization of legislation has been energetically undertaken, force will be ruled out as a factor in the making of law; the improvement of law will no longer have to take place by fits and starts and by means of breaches of the peace.

So much lies on the surface of the theory of legal sovereignty. But its chief reason for keeping the opposition of force and law steadily in view lies in the fact that it no longer identifies the power exercised by officials, the police, and the army in executions and punishments with the state or sovereign and contrasts this power with the law. On the contrary, it regards this power as a legal organism, as part of the legal organization which controls social life. In the words of Duguit, organized compulsion (executions and punishments) is one of the many public services which must obtain their organization from the law. According to the theory of legal sovereignty, the belief must be discarded that this compulsion, as a manifestation of the state or sovereign, ought to have an independent existence.

Furthermore, this theory does not concern itself with the sociological study of the different forms in which particular social forces appear [1]), for it is interested

[1]) Cf. Von Wieser, *Recht und Macht*, 1910.

solely in that kind of authority which arises from the duty to obey. Such an obligation can be derived solely from the law. The relations of the forces actually existing in society enter into its problem only so far as these relations affect the operation of the sense of right and thus make it necessary to minimize the effects of possible disturbances of it. But in this respect social forces are not distinguished from other factors which also may endanger an effective declaration of the law. On the other hand, it is very one-sided to say, as von Wieser does, that the law is an organization of actual relations of power, for this statement does not take into account the complexity of social life. Opposed to or along with the sense of right, there exist in society not merely an actual force which has to be limited or set aside by law, but also numerous other mental processes which affect the working of the sense of right, sometimes limiting it and sometimes supporting it. The law overcomes not only force but also other forms of self-interest, and law is sustained in its control not only by men's feeling for right but also by all the virtues and spiritual values which reside in the human mind.

Our final conclusion therefore is as follows. Authority and power exist in hundreds of forms. All these have as their common element an *obedience* rendered to men, or opinions, or ideals. Political theory seeks among all these sources of obedience that one from which there arises a *duty* of obedience and it finds none in which this is intrinsic except the law, the obligatory force of which resides in men's sense of right. It follows from

this that the authority of the state is nothing except the authority of law and that the concept of the state in its broadest significance is to be traced back to the particular legal order which exists among a people.

VII. *Law as the Rule of a Community.* The study of the binding force of the legal rule must be followed by an investigation of its matter and content. From this point of view we can say: The law regulates men's conduct in order to attain social ends and therefore appears as the organization of a community. Naturally it makes no difference whether these communities are of a transitory nature or whether they have been formed for a permanent end. A community exists when two persons make a contract of purchase. Rules of law determine the conduct of the two parties with reference to the obligations arising from such a contract and after their performance the community comes to an end. Of a more enduring kind are the communities which come into existence with the formation of societies, business partnerships or companies, and corporate foundations. Still more permanent are those communities which have the purpose of caring for public interests, such as dike commissions, communes, provinces, states, confederations, and federal states.

If every community has as its basis a social end, the rules which serve to attain this end must be equally binding upon every member of the community. The unity of purpose postulates *unity of the legal rule.* It follows that a common conviction of what is right must lie at the basis of the legal rules which are valid for

these communities. A rule which arises solely from an individual's feeling for right controls only the will of that individual and hence cannot be a rule for the community. It is possible, of course, and not infrequently it happens, that an individual member of a community lives according to a higher standard of right than is expressed by the rule of the community, but this means merely that the individual feels himself obliged to do more than the "ethical minimum" which is valid for all.

The legal rule, considered as the rule of a community, requires a common conviction as to what is right. Experience shows that this is attainable up to a certain point. In the first place, it should be carefully borne in mind that there is not a special sense of right for every individual, in the sense that the standard of right differs for every individual. There is a standard of truth which is based upon universally valid criteria, contrary to the view of the Sophists that truth possesses merely an individual significance. Similarly in the law also there is a universally valid standard which appears in judgments of right and wrong. And Heymans [1]) has shown that the same is true of ethics also. Hence diversity enters into our opinions as to what is right not on account of the standard which ought to be applied but because the subject matter of legal evaluation is reflected differently in our consciousness. This subject matter is the communal life of men and therefore the modes of conduct and the interests connected with it. If we could adequately conceive these objects, there

[1]) *Einführung in die Ethik*, 1914.

would be no variety in our convictions as to what is right. But in the first place the reality penetrates our consciousness only partially, and in the second place, in so far as it does get into our minds, it affects us differently because of our innate or acquired tendencies. Hence it follows that the object of legal evaluation is differently conceived by different men and this difference of conception gives rise to different convictions as to what is right. This variety of attitude, however, is for the most part removed by the action and reaction of men's minds upon one another, by similarity of education, and by the influence of environment. In proportion as this interchange becomes more vital and more manifold, the possibility increases of bringing about a certain similarity of ideas and a common sense of values and thus of attaining unity in the convictions as to what is right on the part of an increasing number of men. On the other hand, great variety in the sense of right will hinder the attainment of a single legal rule. The effect of this will be that the community may fall apart. Thus its purpose either cannot be attained or can be attained only in fractional communities which enjoy the conditions for developing a unified legal rule.

But even if these conditions exist, unanimity of conviction as to what is right will seldom occur. Hence it becomes a question how a communal rule, that is, a single legal rule, can be secured in spite of differences of opinion about its content.

VIII. *Majority Rule.* The answer to this question is most difficult in the case of customary law. In this case the validity of the law must be based directly upon a common sense of right, though it is regarded as binding even upon those who lack this sense or for whom the sense of right has a different content. In the case of statutory law we can and do simplify the question by personifying the legislator whose will made the law. A single rule of law is assumed to follow from the unity of the legislator's will. In the case of customary law, on the other hand, it is not possible to create such a personality, at least not if the validity of the law is considered to be based upon men's actual sense of right, as is done in this book. The Historical School of Law, indeed, derived even the customary law from a personality, viz., the "spirit of the nation." It thus assumed a power independent of the individual consciousness, which nevertheless evoked legal judgments with similar content in the individuals. Thus for the Historical School the validity of customary law is rooted in a superconsciousness (the "spirit of the nation") independent of the concrete sense of right; its validity for *all* individuals was established by the unity of this higher personality. But we maintain that the rulership of law is based solely upon the concrete sense of right. Hence for us the existence of a single legal rule and at the same time of a difference of judgment regarding the content of the rule is not explained.

Schuppe, whose treatise on customary law [1]) is too little known, also emphasizes the concrete sense of

[1]) *Das Gewohnheitsrecht*, 1890.

right in explaining the binding force of law, but he involves himself in a labyrinth of fictions in order to show that customary law is rooted in a *universal* conviction about right. By the use of this argument he tries to refute Zitelmann's[1]) contention that, if customary law originates in the working of men's sense of right, it is binding only upon those who obey it.

Schuppe tries to escape from this dilemma by saying that action which deviates from the rules of customary law is due either to a divergent conviction as to what is right or to the fact that the feeling for right is overcome by other impulses. In the latter case the action is wrong; in the former case, right or law (*Recht*) is opposed to another right or law. But such an opposition is intolerable in practice, and hence Schuppe tries to save himself by laying down the rule: "You *ought* to have the common conviction as to what is right." On this point we are unable to agree with the learned author. One makes no progress by setting up an obligation to have an obligation. For every obligation must be rooted in the convictions of the person who has the obligation, and in the case which Schuppe supposes, it is precisely this conviction which is lacking. No, Zitelmann is perfectly right; customary law in the sense in which he understands the Historical School is binding only upon those who obey it. In other words, if customary law owes its binding force to the dictates of the concrete sense of right, only those men are subject to it by whom these dictates are felt. Still it is invariably true that

[1]) "Gewohnheitsrecht und Irrthum," *Archiv f. d. civil. Praxis*, V l. LXVI.

where customary law exists it is applied also to those whose sense of right is opposed to it. Does this not imply that they *ought* to act according to the law which is imposed upon them? If so, then for them the validity of this law rests upon something other than the dictates of their own sense of right. Thus the explanation which we gave of the binding force of these rules would have to be given up. But it cannot be given up, for there is no real ground for the binding force of law except the agreement of its rules with men's sense of right.

The solution of this difficulty, then, must be sought elsewhere, and it is really to be found by bearing in mind the fact emphasized above, that the law is the rule of a community. It follows from this that the law cannot include rules which are mutually contradictory. The purpose of a community can be realized only if there is a single rule. The value of having a single rule is therefore fundamental. This is the *highest legal value*, a higher value than that belonging to the *content* of the rule, since having a single legal rule is an indispensable condition for attaining the end of the community. This end can be attained more or less completely in a variety of ways, but it cannot be attained at all without having a single rule. Hence our sense of right attaches the highest value to having a single rule and sacrifices, if necessary, a particular content which might otherwise be preferred.

If this analysis of our sense of right be correct, the question arises what content must be sacrificed in order to attain a single legal rule. If the sense of right

among the members of a community differs regarding the rules to be obeyed (assuming the sense of right to be equal in quality), those rules possess a higher value which a *majority* of the members are willing to accept as rules of law. It is necessary that there should be a single rule, and if the persons who have a share in the making of law are of equal importance, a choice between the different possible rules can be made only with reference to the *number* of persons who assent to each. But if numbers must decide, this leads of itself to the acceptance of the rule approved by the *majority*, because the fact that it is accepted by the majority shows that it possesses a higher value than any other rule. If this be kept in mind, it is clear that the key to the rulership of customary law, even for those who entertain a different conviction as to what is right, lies in the fact that the legal value of having a single rule justifies such rulership. Those who would prefer to be governed by a different rule cannot act according to their preference. Even according to their own sense of right, it is more important to have a single rule in the community to which they belong than to have the rule which they prefer. Consequently, for those whose convictions accord with the rule, the obligation to obey the customary law rests upon the value of the *content* of the rule; for all others it is based upon the value of having a *single rule*. This means that that rule must be accepted as binding which is proved to have *quantitatively* the highest legal value. The higher value in this case is determined quantitatively and a rule of customary law is present as soon as it is supported by the

sense of right of a *majority*. For the existence of customary law it makes no difference whatever who the persons are whose sense of right has contributed to the making of the law.

The same thing naturally holds good for statutory law also. Where there is a representative assembly, the sense of right of each of its members has an equal value in law-making. Here also the rule approved by the majority, as that which possesses quantitatively the highest legal value, becomes the rule of the community.

This natural justification of the legal force of a rule approved by a majority is opposed by those provisions which require more than a majority to change certain rules of positive law. Many constitutions require for their amendment the assent of more than a majority of the members of parliament, sometimes two-thirds or three-fourths. Such provisions have no legal value; they are not rules of law and so are not binding. If a simple majority has expressed itself in favor of a certain change in the law, the law as it stands is thereby condemned. Since the new law can be made effective only by more than a majority, the law of a minority will be kept in force. That is, the higher legal value will be sacrificed to the lower, which, if the equal importance of all members of parliament be admitted, not only clearly contradicts this principle of equality but also weakens the law as a rule of the community. For it is precisely because the law is the rule of the community that it is necessary to have a single rule. By departing from the system of a simple majority more than one rule may be established, since in the nature

of the case a number may contain more than one minority. The strongest law is undoubtedly that rule whose content is approved by the entire membership of the legislative organ. In proportion as one approaches the simple majority, the legal value of the rule will be determined more and more by the value of having a *single* rule, until the simple majority is passed. Beyond that point the whole legal value of having a *single* legal rule is lost (to be sure this does not affect the total value attaching to the *content* of the rule) and therefore the rule has necessarily lost the character of a rule of law. But this will invariably happen in the case of constitutional amendments for which more than a majority is required, if the existing law remains in force for lack of the larger majority, though a simple majority is opposed to the existing law. The maintenance of the existing rules means only that they will continue to be obeyed, not that they are really rules of law and therefore *ought* to be obeyed.

To sum up, then, we may say that while the concept of law is defined on the one hand by the relation of the rule to men's sense of right, on the other hand its character is governed by its relation to the communal life. If the law is divorced from men's sense of right, it loses its character as law and its rulership is at an end. If the law is divorced from the interest of having a community, its rules cease also to be rules of law. It may indeed be a very valuable rule but it belongs to another realm than that of law. We cannot speak of a sense of right without taking account of the realm in which it ought to be valid. The sense of right has its own sub-

ject matter to evaluate. As logic governs thought, so the sense of right governs the realm of communal life. And with reference to this particular object, it is more important that there should be a *single* rule than that the rule should have a particular *content*. Since there cannot be a single rule except by recognizing the principle of the majority, the communal life, which controls our consciousness and makes the sense of right effective in us, carries with it the obligation to govern our conduct according to the rule approved by the majority.

IX. *Criticism of Objections to the Majority Principle.* The principle of majority rule offers a point of attack to opponents. To some it appears unreasonable that the decision between right and wrong is made to depend upon numbers. Again, it is objected that an ordered community is constructed from an "anarchical" material, the individual sense of right. Sometimes we are reminded that the decision of a "momentary majority" may be dictated by "sheer illusion." Finally the theory has been declared to be nothing more than a repetition of Rousseau's futile distinction between the "general will" and the "will of all." It would seem as if this were enough to condemn a theory which regards the will of the majority as law.

We open the Dutch Constitution and read in Article 106: "In all votes upon ordinary measures a simple majority decides." Is this then a mistake? But it is a mistake which is repeated in all constitutions. The evil is therefore very wide-spread, and this makes it the

more important to understand how the simple explanation offered here should have remained so long unperceived in this country and elsewhere. We suspect that it is not perceived merely because law-making by the simple majority is inevitable. The denial of this universally valid rule rests on a complete misunderstanding of the facts. The only thing that science can do in this case is to explain the rule and show why it is inevitable. This may be done without special reference to the problem of law-making, in which case the question is purely psychological. Or, on the other hand, the explanation may deal especially with law-making, in which case the question to be answered is: How can a decision by the majority give rise to binding laws if their binding force is derived from the individual sense of right?

The psychological explanation is to be found in the analogy with the subjective process of making a voluntary choice. If we are considering the attainment of a particular purpose, we try to evaluate the effects which the realization of this purpose will have upon our life. Some of these effects will agree with our inclinations while others will run contrary to them. But we cannot keep on forever tracing out these effects and evaluating them. We are practical as well as speculative beings. Some time or other we have to cut the process short, and the end to be realized either becomes an object of our will or not, according as the feelings which impel us to action are stronger or weaker than those which deter us. Even the smallest balance on the one side or the other determines our action. This is a psychological necessity from which there is no escape.

Therefore the moment when reflection comes to an end is of the highest importance. According to the relation in which the purpose to be achieved then stands to our inclinations, our will has one content or another. Consequently we nearly always suffer more or less from the effects of such a decision, for certain sides of our personality will be injured by it. The complexity of our lives forces us to submit to this tragedy. The less complex human nature is, as among immature individuals or peoples, the less frequently do these causes of unhappiness and dissatisfaction occur. As the differentiation of personality progresses, however, the conflicts increase and the decisions become more difficult, until we become masters of this complexity by subordinating our whole lives to the realization of specific valuable ends.

The same thing happens when a group of men have a definite task to perform. To reach their goal ends must be realized and decisions made in regard to which individual members of the group may have different opinions. The validity of the majority principle, as a way of arriving at a conclusion, is just as natural in the group as it is in the subjective process by which a voluntary choice is made in favor of or against a decision. There is no other way in which we can unify the multiplicity of opinions. Only by decreasing or removing this multiplicity can one avoid the use of this rough and ready method.

In fact, the way to freedom lies precisely in the decrease, or perhaps the removal, of multiplicity in every group. This may be accomplished either from within

or from without. It is achieved from within when particular parts of the group are brought together in behalf of a definite principle to which all decisions are subordinated. In political assemblages the party system offers an example of this way of eliminating multiplicity. It should not be forgotten, however, that by this method a certain part of our individuality is always lost and therefore the mental life is shackled, even though this is done voluntarily. Multiplicity can be diminished from the outside if the groups are formed of persons well versed in the matter to be decided. By agreement upon matters of fact the divergence of judgment and valuation is diminished and the drastic method of deciding by a bare majority need be used only seldom if at all. This consideration supports the recommendation for the decentralization of law-making.

This brings us to the explanation of the majority principle specifically in law-making, that is, in relation to the sense of right, which we have adopted as the basis for the validity of law. We found this explanation in the fundamental value of having a single rule, which is greater than the value attaching to the content of the rule. This formulation of the significance of the majority principle in the field of law is very closely related to the view presented above of the subjective process of making a voluntary choice. Just as we are compelled by duty or force of circumstances to reduce our diffused life to a unity, so the task of a body devoted to law-making includes the requirement of providing a single rule for the community which it serves. The majority principle is the indispensable condition

of fulfilling this requirement. In so far as multiplicity of judgment cannot be set aside by one of the means mentioned above, the application of the mechanical principle of the majority is a legal necessity, because it follows from the fact that the law is a means of establishing order in the community. In this function lies the primary meaning of law. Our sense of right expresses itself first and foremost in the value which we attribute to order in the community, whatever the content of this order may be, and order is impossible unless there is a single rule. Hence the majority principle, without which this can never be brought about, must be accepted as a legal necessity, a postulate of our sense of right.

But it must not be forgotten that a law is insecurely founded if, for a strong minority, it possesses value only as a means of order and if its content does not satisfy their sense of right. In such a case voluntary obedience and the spontaneous operation of the legal system may be seriously endangered. If this happens the law loses its significance as a spiritual force. When the majority principle is stretched to its limit and only a bare majority is satisfied with the content of the law, this principle fulfils the idea of right in an almost purely formal sense. In proportion as the majority increases, law gains in strength by virtue of the increase of its inner value. Since we must aim at the increase of such inner value, legislation must be directed to making a law which conforms entirely to the idea of justice, as this is expressed in the common judgment as to what is right.

X. *The Individual Sense of Right.* After this explanation of the proper place of the majority principle in law-making and of the place accorded it in practice, the objections urged against the principle will scarcely cause us further uneasiness. It has been said that if we seek the basis of the legal order in the individual sense of right, the ordered community would be constructed from an anarchical material. The individual sense of right an anarchical material! The sense of right is a part of the human mind, and what other minds are there except those of individual men to take into account? All the treasures of the spiritual life are brought together in the individual mind and only there can we observe this spiritual life. Only our own conscious life is given to us in immediate experience, but when we consider the phenomena in which the conscious lives of others manifest themselves, we can form some idea of these also. And this immediate and mediate experience contradicts decisively the proposition that the sense of right works according to different standards in each individual.

There is another line of argument which, like the preceding, betrays a neglect of psychology. For how else can we explain the objection that this theory starts from an "absolute individualism," instead of taking account of the fact that, "Nature has its eternal laws which are independent not only of the free will but also of the acceptance and approval of men and which govern their wills?" The theory, it is asserted, does not recognize "determination by objective norms." In this criticism we can see only a misuse of words. One

could speak of an "absolute individualism" only if, as the School of Natural Rights assumed, the state arose for the preservation of individual interests and found its sole mission in caring for them. But is it still necessary to refute such a notion as this? The further we go back in the history of civilization the more human nature is restricted on all sides, until the individual disappears completely and the life of the group is dominant. From the historical point of view at least it is impossible to speak of basing the community upon the individual. If determination by the community is the natural state of man and all men are born into an established community, how can we avoid assuming that consciousness will be saturated with the notion of the community? Where, then, are we to find a consciousness filled exclusively with individual interests? It is folly, therefore, to charge a political theory with "absolute individualism" because it starts from the individual consciousness. If the notion of the community is something which cannot be rooted out of this consciousness, absolute individualism can be neither the beginning nor the end of such a theory. In the case of the theory we are defending the criticism is even less appropriate, since from the general consciousness it selects the conception of right for special emphasis; it must therefore regard the community rather than the individual as primary. If the sense of right be taken as the source of law and therefore of authority, the community rather than the individual is necessarily taken as the point of departure.

If, however, this objection means merely that the

theory denies "determination by objective norms," the critic is on the wrong track entirely. For what appears in our minds as the sense of duty has objective value. In other words, it is quite withdrawn from arbitrary choice. What results from the working of the sense of duty has none of the marks which characterize a merely subjective estimation of value. The objective character of the rule of law is directly implied in the fact that there is a standard in us which operates objectively.

It is urged on the other hand, however, that we should have sought for rules whose *content* had an objective value, and not merely for an internal *standard* which has objective value. We have already seen what sort of rules are assumed to have such an objectively valid content, when we answered the criticism that our theory does not take account of the "ultimate destiny of human life" or of the "historical mission of a nation." We are quite unable to see how these formulae aid in explaining the origin of positive law. If anyone does see, he should explain it. To us, and perhaps to many others, this is mysticism. We cannot make a beginning in this way, any more than we can by means of the rationalist formulae of the School of Natural Rights in which, for example, the "perfection of humanity" is set up as an ultimate standard. If we will not rely on the pronouncements of the sense of right, we fall back upon the old law of nature, as is still seriously proposed by Catholic scholars. Thus we must start by setting up a few fundamental rules and then derive from these by means of logic all the legal obligations which men must observe. Perhaps this is the method our opponents

have in mind. But it lacks precisely what is the chief feature in the theory of legal sovereignty, viz., an ultimate judgment with regard to the binding force of the duties thus deduced. The fact that one rule can thus be deduced from another (perhaps even from a fundamental rule) is not decisive with reference to its binding force, for logic is decisive only in its own domain. The correctness of the deduction may be logically unassailable, but in law as in ethics it does not carry with it an obligation to act according to the rule deduced.

An obligation can arise only when a feeling of duty exists in the human mind. Here we find two possibilities. The content of such a feeling of duty may be revealed by God. Whoever believes in such a revelation is at least provided with a certain number of rules whose content is objectively established. Those who do not believe in revelation lack such rules and are therefore restricted to the obligations which the sense of duty for the time being imposes. Here too, however, we are confronted by a force to which we feel ourselves subject and which therefore has an objective value in our lives. The only difference between the two cases lies in the distinction between objectivity of *content* and objectivity of *criterion*. For those who believe in revelation, a certain number of rules, to be found in the Bible or in the commands of the Church, are established *a priori*. Whoever does not accept these authorities must reflect upon what experience teaches concerning the criterion applied in judgments of right. But he can get no farther than a knowledge of this criterion. And in case the criterion thus discovered does not suffice,

the feeling of duty directly and immediately decides what ought to be done or omitted. Especially where unwritten law must be applied it is this immediate, intuitive operation of our feeling or sense of right which makes the decision. In all cases, however, where we directly express judgments of right or express them indirectly on the basis of experience, these judgments have their roots in a mental order in which arbitrary choice has no place. We can therefore maintain our position without qualification and adhere to the objectivity of the basis of law which we have found in our sense of right. Hence the theory of legal sovereignty recognizes very definitely "objective standards of value," but only in the sense that this objectivity is to be found not in an unchangeable and eternal content but in the source from which the rules derive their legal character.

XI. *The Quality of the Sense of Right.* But must not the quality of the sense of right be taken into account? There can be no doubt that this question is to be answered affirmatively. And in fact quality is taken into account, though in a wholly insufficient degree, as we shall see. But we must first consider what is meant by the quality of the sense of right. If it means that in every man there exists a particular mental reaction and that, according as this reaction follows one course or another, the quality of his sense of right is to be rated as higher or lower, this view is to be rejected at the outset most positively. Kranenburg has tried repeatedly to impress upon jurists a fact which he has illustrated from experience, namely, that the individual sense of

right operates according to common fixed laws, though its operation may be disturbed or modified by many influences. As he remarks,[1]) "The actual circumstances under which the rule [of the sense of right] operates are so different in different stages of development that positive law also must necessarily vary." The sense of right, therefore, does not vary in different individuals because each one has his own standard and criterion to apply, but because the normal functioning of the sense of right which is the same in every one is disturbed in so many different ways. If this disturbance could be prevented, the operation of the sense of right would lead to the same results in every one.

By the higher or lower quality of the sense of right we can mean, therefore, only the greater or less possibility of disturbing its operation. It is from this point of view primarily that we have to determine and criticise the exclusion of certain persons from a share in law-making. It follows that exclusion by means of suffrage qualifications must be based only upon *natural* qualities which interfere with the operation of the sense of right, such as youth or insanity. Exclusion must not be based upon defects which, like poverty, are a result of the existing *legal system.* For this would give effect to those derangements of the sense of right produced by the interests of the propertied class but not to those produced by the interests of persons who have no property. Legislation ought, however, to give equal weight to the interests of both classes.

Far greater importance attaches to differences in the

[1]) *Positiefrecht en rechtsbewustzijn,* 1912.

sense of right resulting from a greater or less *knowledge of the interests* to be provided for by legislation. This is the field in which the quality of the sense of right makes a real difference, or at least ought to do so. So far as concerns the individual who is to express a judgment of right, all that is needed to entitle him to a share in law-making is that his mentality should be deemed normal within the limits established for the time being. So far as concerns the object on which his judgment is to be exercised, however, a higher qualification must be established. For the proposition that the sense of right of every normal person ought to have a share in law-making does not mean that every one ought to pass judgment on the legal value of *all* the interests of the community. A *knowledge* of the interests involved is also needed. The sense of right cannot be required to pass judgment upon the legal value of interests which are not present to consciousness or which occupy a very small part of it. The objection which can be brought against the existing legislative organization lies in the fact that men are called upon to legislate for interests that lie beyond their intellectual horizon. When legislation is concentrated in a few organs, the legislator is forced to pass judgment upon the legal requirements of many interests which he does not understand or understands only slightly. The share which each person's sense of right shall have in law-making is to be determined by the interests for which the legislation takes place. That is, the degree of the legislator's knowledge of an interest must determine whether and how far his sense of right is to be made

effective over that interest. No person who is mentally normal should be excluded from the possibility of giving effect to his convictions as to what is right, but this possibility should be limited to a share in such law-making as he is competent to undertake. And under no circumstances can he be competent to do more than influence such law-making as determines the legal value of interests which lie within the circle of his experience and knowledge. This result cannot be achieved, however, unless the organization of legislation is developed very much farther than has been done up to the present time. A much more complete decentralization than we now have is a direct implication of the modern idea of the state, in so far as this theory derives all authority from the operation of the sense of right. We shall deal with this point more in detail hereafter. A limitation of its sphere of activity is absolutely necessary to enable the sense of right to reach the limits of its real power. Its natural limits are set by the interests which the legislator can grasp and understand. If, then, for different groups in the community we can approximately ascertain the interests in an understanding of which the strength of the group consists, and if we can then organize these groups as law-making associations, the popular sense of right will for the first time have attained a qualitative organization.

The qualitative sense of right which the representative system seeks to establish and whose operation is seen in the making of statutory law is of quite a different sort. To this subject a separate section will be devoted.

XII. *The Making of Statutory Law.* The making of statutory law in most civilized states originates in the operation of the sense of right of that part of the population which is permitted to exercise the electoral franchise. In what does this operation consist?

Legislation produced by the exercise of the franchise may be of two sorts: The electors may express their judgment with regard to the *content* of rules of law or they may decide only upon the *standard* by which the legal value of rules is to be determined. In granting the suffrage it is the latter which is chiefly aimed at, that is, the establishment of a standard. This takes place by designating certain persons by whose sense of right rules are to be tested, other persons being excluded. The exercise of the suffrage effects a *selection* among the citizenship and the elector's sense of right has no effect upon legislation beyond making this selection. A capacity to do this is the determining consideration in granting the franchise. This marks the beginning of an organization of legislation and consequently every one can be included in this organization whose sense of right is competent to perform this process of selection. Any one who possesses such a sense of right *ought* to be given a share in this process, for the ethical force as well as the validity of the law postulates this.

But no one in the world can control the working of the sense of right. Its operation may be organized, as is done in settling the franchise. But to what extent the elector's sense of right may express itself the legislator cannot determine. Thus it happens that the elec-

tors, in choosing members of parliament, express their views about the main points of public administration and choose candidates because they agree with these policies. The prohibitions in most constitutions against mandates and instructions are futile and ineffective. The electors can thus use the franchise to express their views concerning the *content* of rules of law. And in so far as they do so their representatives are no longer free with reference to the bills in which such principles have been embodied. The authority of the representative lies in the value which his sense of right possesses in the making of rules and this value is borrowed from the legal convictions of a majority of the electors. These legal convictions ought to be taken into account so far as they have made themselves manifest. For it should not be forgotten that according to the modern idea of the state the electors' sense of right furnishes the ground of their right to the franchise and this sense of right is the basis of the binding force of the statute. This sense of right should therefore continue to act in the person whom they elect, in so far as he has been chosen on account of his political opinions about specific parts of the law.

It is not to be inferred from this view that after a person has been elected he ought continually to hold conferences with his constituents. To be sure, the importance of the vote cast by a member of parliament upon a bill depends upon the legislative value which his sense of right can claim because of his election. But excepting the few main points of legislation upon which the electors have expressed themselves in exercising their franchise, there is no direct connection between

the elector and the authority of the statute passed by the vote of the deputy. Hundreds of times the deputy votes upon rules which the electors did not and could not have had in mind. In such cases the exercise of the franchise does not settle anything objectively concerning the rules; it determines something merely subjectively. That is, it indicates what sense of right is to pass upon the legal value of the rules. If this is the case, the deputy cannot accept any sense of right as a standard except his own, not even that of his constituents. The term "representative" leads to misunderstanding. The deputy can represent his constituents' sense of right only in respect to the few main points which were issues in the election. So far as concerns all other points he knows nothing of his constituents' sense of right. He is a representative only in a small and strictly limited field of legislation. Outside this he represents nothing and must depend solely upon his own sense of right. For it is his own sense of right and not the more or less conjectural legal convictions of the electors which possesses the value needed to give a rule the quality of law. A deputy who keeps himself tied to his constituents' leading-strings mistakes the meaning of the votes that placed him in office, for the group of electors to whom he owes his place has approved his and no other sense of right as the standard for further legislation. As a rule, therefore, in exercising the franchise normative force is merely imputed to the sense of right of particular persons. And except in those cases where a referendum takes place, the evaluations arising from the sense of right *of these persons* has final significance in the

making of statutory law. Consequently the independence of deputies from their electors must not be undermined because the law is to be regarded as a rule which is given legal authority through its acceptance by the sense of right. For if this independence be destroyed either wholly or in part, the decision is left to the sense of right of persons other than those whose legal convictions have normative force. Thus the meaning of election is falsified, since the purpose of the election was to select a sense of right.

XIII. *Legislation as the Operation of an Organized Sense of Right.* If then one seeks the binding authority of statutory law as this law is made in most civilized states, it is to be found in the normative force attaching to the sense of right of the members of legislative bodies, which in turn is derived from the sense of right of the electors. The sense of right reached by this selection is on an altogether different footing from the process of selection which takes place in hereditary monarchy. The latter tries to arrive at a highly developed sense of right by means of descent from particular families whose ancestors have been of more or less service to public interests. In this case the selection rests on biological factors, on the inheritance of racial characteristics, and is therefore a process of natural selection. As we now regard law-making, a standard obtained in this way cannot be considered a satisfactory security for the relation between statutory law and the popular sense of right. Such a relation must exist in order to assure to the law the greatest possible inner force and validity.

A rule must be based upon the sense of right of the members of the community if the order under which we live is to be a *legal* order. Upon this it has always been based more or less. No new authority originated with the introduction of the representative assembly and the granting of the franchise. The principle upon which legal authority had always rested was merely *organized*. The sense of right has always existed, has always made its activity felt, has always been the basal principle of lawful authority under all forms of government. But the constitutional system for the first time opened a normal channel to the sense of right in which it could flow regularly and continuously and thus form a secure highway for the communal life.

Before the era of constitutional government history was a succession of periods each marked by an organization of power, a caste of warriors and officials, originating historically from society, which exercised authority and maintained among the people the belief that the organization was sovereign "by the grace of God" or by virtue of the "social contract." So long as the mind had to wear this yoke of traditional dogma, the sense of right in the members of the community offered resistance only spasmodically. It manifested itself in the written and spoken word and sometimes even in deeds, but it was never able to throw off the rule of the caste, because it lacked organization and co-ordination. Then this organization and co-ordination sprang up suddenly and spontaneously under the leadership of those men who, when the time is ripe, are never sought in vain but who arise of themselves to weld the fragmentary

conscious life of the masses into an irresistible authority. The mind was confused by the glitter of the old authority but then the tide receded. The insubstantial structure of the *ancien régime* fell in ruins. Thus opened the period at the beginning of which we still stand, when it became possible for the rulership of law to develop. But the constitutional system is connected with the institutions of the *ancien régime*. Not only is the whole machinery of army and officials retained, — this could hardly have been avoided, — but this machinery is still conceived as a ruling power, as the authority of the state, which manifests itself according to Montesquieu's theory in three branches, the legislative, the executive, and the judicial authority. The rise of the representative assembly is interpreted as the granting of a share in one of these branches, the legislative authority. Hence the representative assembly does not assume the commanding position of an organ of law but owes its power rather to its connection with the state, while the governmental organization maintains itself as the real state. An element originally foreign to it, the representative assembly, is incorporated in it, with the result that the importance of this assembly is found in its position in the state, not in its own character as an organ for expressing the people's legal convictions.

Step by step, however, this character comes to the front and thus the belief gains ground that, because of its origin and purpose, real authority is to be found only in the representative assembly. It is no longer believed to reside in the traditional machinery of government which for centuries, because of its actual prepon-

derance, had exercised the ruling power and both in theory and in practice had been treated and revered and established as "the state."

If, however, it is recognized that the authority of the state *ought* to be primarily an ethical power and not a rulership resting upon supremacy secured by organization, and if the view develops that this ethical power resides only in men's sense of right, then the original idea of the state re-appears, as a power embodying only a spiritual authority, and the sovereignty of law is again revived. On the other hand, the various powers formerly attributed to the state assume the character of products of law. No authority can belong to them except as it is derived from the law.

A perception of this truth is the net gain from the development of the constitutional system, but as yet we have not gone much beyond this. We shall have to discuss later the practical realization of this idea of the state, but even here emphasis ought to be placed upon the practical problem which from now on takes precedence of all others. This is the problem of finding adequate organs to express the conscious life of men, in so far as this is manifested in a sense of right. Both quantitatively and qualitatively this organization in all countries leaves much to be desired, because the leading statesmen are not yet sufficiently impressed with the importance of solving the problem of legislation. The popular sense of right, which is now so scattered and disconnected, must be gathered together and given expression in more numerous organs than have hitherto been charged with the making of law. This is

a problem which ought to receive the entire attention of all governments. But besides the increase in the number of agencies for law-making, it is an equally important question whether existing organs, our states general, provincial assemblies, and communal boards, are so constituted that the sense of right of the entire population can influence their composition. And it is also a question whether, in view of the varying qualities of the sense of right, more is not required of it than it can properly be deemed capable of. At present many a citizen, in his capacity as elector or member of a representative body, is called upon to make legislative decisions involving evaluations which surpass his knowledge of the interests affected and therefore his sense of right. On the other hand, it may also happen that a more highly developed sense of right is denied the opportunity to exercise its full influence upon legislation.

Political theory, therefore, should concern itself primarily with organizing the life of the people as this life is expressed in legal relationships. This is likewise the central problem for jurisprudence generally. When these two sciences unite in the effort to solve this problem, it may be expected that the modern idea of the state, which is still in swaddling clothes, will reach its full growth and that the authority of law will attain its full validity in the social life.

XIV. *Unwritten Law.* A. *Content.* The term "unwritten law" indicates a rule derived from the operation of the sense of right in a people, when there are no definite

organs for expressing it. Originally the idea prevailed that law must be in some degree tangible and fixed, since it was insisted that law, if it was not contained in a statute, must at least appear as custom. This view, however, loses sight of a portion of the law which is actually enforced. There are judgments of courts and administrative decisions which, without resting on custom, are nevertheless founded upon law. Hence investigation reveals an extraordinarily large field of unwritten law which is still not customary law. Thus the basis of law becomes still more remote. No one is content any longer with the will of the legislator, and to supplement this by law based upon custom is also insufficient. All unwritten law, both customary law and that which is not based upon custom, must be kept in mind. Under various names, such as expediency, equity, reasonableness, morals, and social behavior, but without the medium of either statute or custom, the sense of right directly determines the decision which the judge or the administration renders in settling a conflict of interests. In such cases the suitor at law or the judge is confronted by a far more delicate problem than in cases where the law is more tangible. In order to find the law they must get into touch with the legal notions of the social circle to which the interests concerned belong and must adjust their judgment or conduct to the views which govern that circle. Kosters in particular insists that this is a duty of the judge, especially in connection with the search for customary law. [1]) "In case the pop-

[1]) *De plaats van gewoonte en volksovertuiging in het privaatrecht*, 1912, p. 101.

ular feeling for right does not express itself positively through custom, the judge will have to settle this for himself with the means at his disposal, by the statements of experts, literature, popular traditions, etc. The well-being of the society for the benefit of which the judge performs his duties involves among other things that the judge shall not set himself above the opinions of this society. He must render his decisions in accord with the views which dominate this society, and more particularly in accord with those of the circle to which the interested parties belong, so far as they are compatible with order and morals." A more general statement of this point of view by a Swiss jurist is to be found in a Rectoral Oration by Eggers. [1]) Speaking of the Swiss Civil Code, he remarks that it contains numerous provisions permitting a very considerable latitude of decision, but this latitude refers not to the private views of the judge but primarily "to the opinions and social good sense of the members of the community." The unwritten law, therefore, even when it does not express itself in custom, has an objective character in so far as the rule to be applied invariably owes its content to the life of the community.

B. *Necessity*. However well organized a people's sense of right may be, the organization will never be able to satisfy the need for law. This is due to several reasons. In the first place, all the relations of life, present and future, cannot be exhaustively organized, partly because the imagination of the legislator does not extend so far and also because it is often impossible to

[1]) *Schweizerische Rechtssprechung und Rechtswissenschaft*, 1913.

find out what is really just except by reference to the concrete circumstances. In the second place, the making of law by the legislative organs cannot keep pace with the shifting value of social interests. A statute may represent the legal value of these interests at a particular moment, if it does justice to the importance which these interests have in their present relations. But with a change in these relations a different legal valuation arises which does not always find expression in new legislation. Then, independently of the functioning of legislative organs, an unwritten law comes into existence which has the same basis for its binding force as the statutory law.

The objections to recognizing this unwritten law arise from the special significance attributed to statutory law. This special significance, however, exists only if the binding force of law is sought in the will of a sovereign by whom the rule was issued. According to this view, unwritten law and statutory law have each a special basis for its validity, the statutory law derived from the sovereign taking precedence. This view reaches its climax when the statutory law is made competent to nullify any unwritten law, even customary law. This is what the Dutch Legislature undertook to do in Articles 3 and 5 of the statute fixing the general rules that govern legislation. [1]) These articles assert that, "Customary law is valid only when referred to by statute," and that, "A statute can lose its legal force only by a later statute." This whole line of argument has to be given up, however, as soon as we abandon a sovereign

[1]) "Algemeene bepalingen der wetgeving van het Koningrijk."

endowed with original authority. When this view is abandoned, statutory law is seen to differ from unwritten law only in the manner of its origin and not in the reason for its binding force. No power on earth can control the action of the sense of right and when it acts, a binding rule follows spontaneously. The action of the sense of right is reduced to rule by the representative system, but this system possesses no monopoly of it. This is not to deny that at times statutory law stands higher in the estimation of men than unwritten law. This is due to the fact that the former arises from a qualitative sense of right secured by selection; it is not because statutory law is the law of the sovereign. And if it be borne in mind that statutory law, though a product of selection, still in the last resort is based upon the popular sense of right, it must be admitted that the unwritten law, which derives its binding force from the same source, is of equal value, whenever it is felt as living law.

C. *Supplementary*. The field in which unwritten law is mostly found is that which the statutory law has not occupied. Unwritten law has primarily a *supplementary* function. It fills the gaps in the statutes. When one's attention has once been directed to the discovery of unwritten law, one is amazed at its extent. Let us consider the following cases as examples. It often happens that some organ of public interests is clothed by positive law with authority, without any rule being laid down for the exercise of this authority. The amending power and the power of *enquête* are given to the legislature without limitation. Does it follow, then;

that these powers can be exercised for any purpose? Are there no limits beyond which their use is not permissible? That such limits exist is not open to doubt. Freedom from statutory limitation does not at all mean freedom from legal limitation. Consequently one finds that the textbooks take pains to discover rules defining more exactly the exercise of these powers. But what they seek is unwritten law, which, as supplementary to constitutional law, embraces an important part of the public law.

Again, unwritten law is applied when the government makes disbursements or collects revenues without a budget, if the latter has not yet been passed by parliament. Another application occurs when the police, without express authorization by statute or ordinance, independently takes measures to protect the public against accidents in case of a derangement of traffic or to preserve the right to use the public streets in case of a crowd. Again, unwritten law is applied when a minister, setting aside a statute, prohibits or limits the exportation of gold in some special crisis, in order to preserve the country's purchasing power in foreign markets. All these officials act according to unwritten law. Their acts conform to the sense of right of the community. It is this and this only which gives these acts legality; they possess legality only in so far as they can reasonably claim to conform to the communal sense of right.

The example last mentioned brings us in particular to a field of unwritten law which has been well known from antiquity, what is called the law of necessity. So

long as the view prevails that law is made by the sovereign and so is to be found exclusively in statute, the law of necessity means a setting aside of statute and thus a restriction of law dictated by necessity. Then the effort must be made to regulate this law of necessity as far as possible by the legislature in order to preserve the rulership of law even in cases of necessity. But with the abandonment of the notion of sovereignty and with the recognition of the real ground upon which the binding force of law rests, the law of necessity appears in quite a different light. It can be regarded only as an unwritten law for cases not provided for by statute and which in many cases could not have been foreseen. The law of necessity is therefore *another* law, which can claim the same validity as statutory law and which differs from it only in being unwritten and in having to do with the control of other circumstances than the normal ones contemplated by the statute.

The field of administrative law frequently needs to be supplemented by rules of unwritten law, especially whenever administrative authorities are entrusted by statute with a so-called discretionary power. Thus for example the approval of such authorities may be prescribed without any rule being laid down to govern the granting or denial of this approval. It is perfectly clear that such a power cannot be exercised arbitrarily. But if this be admitted, it must be possible to discover legal rules by which the legality of the decisions made can be tested. Every power is granted on condition of its being exercised reasonably and we must appeal to

unwritten law in order to be able to apply the standard of reasonableness to any decision.

Whenever certain undefined rules are laid down for the exercise of authority, unwritten law has to be invoked to establish concretely what these indefinite directions really mean. Examples of this occur when authority is to be exercised in behalf of the public order, the public peace, the public morality, on the occasion of a sufficient need, or in the general interest. Unwritten law, therefore, makes it possible to judge of the legality of the decisions reached.

The unwritten law makes itself felt even in the field of criminal law, though it is said that only statutory law is in force here. The Dutch statute on burial provides that a corpse must be buried but neglects to say who is responsible for the interment. It has been concluded that punishment is excluded in this case because no one can be described as the guilty party, and this conclusion is incontestible if there is no law outside the statute. And yet any one who can recognize the operation of the sense of right outside legislation has no reason to be at a loss, in spite of the silence of the statute. For he finds that the sense of right of all Christendom has clearly expressed itself concerning the responsibility for the burial of the dead. No one will deny that in the case of children this duty devolves upon the parents and *vice versa*, and that it is reciprocal as between husband and wife and brothers and sisters. But if our inner sense of right admits this in the great majority of cases, has not this unwritten law a validity at least as unconditional as the statute?

Finally, if one surveys the field of private law, one finds many institutions and relations about which statutory law is silent but which are none the less valid legal institutions and relations in social life, in spite of the absence of support by statute. Moreover, if one considers the most recent statutes and codifications of private law, one is even more surprised to see in how many fields the statutory law itself has contracted and has surrendered the control of relations between the members of the community to unwritten law, that is, to the rules which ought to be binding according to the prevailing convictions as to what is right.

The judges would long since have recognized this unwritten law openly, if the Court of Cassation (in the Netherlands) had not been committed to statutory law. For this reason the whole judiciary had to accept statute as the only source of law. Under these circumstances the unwritten law has to force its way in by the bye-paths of statutory interpretation, and one is often amazed at the cleverness of the judges, and sometimes at their courage, in injecting a rule of unwritten law into a statute and then emphasizing it as a statutory rule. The most striking example of this is the interpretation of Article 625 of our Civil Code, which has the effect of preventing *unwarrantable* interferences with property by ordinances. While the article in question has not a word to say about warrantable or unwarrantable interferences with property, in cases where it would be contrary to the prevailing sense of right to leave communal councils supreme over the limitation or extinguishment of property rights, the Court of Cassation

has quite rightly assumed jurisdiction. Since it felt, however, that it needed statutory authority to do this, it has availed itself of this Article which is entirely silent regarding such jurisdiction but which has been made to speak by the Court of Cassation.

D. *Abrogating and Modifying.* The unwritten law can abrogate and modify statutory law as well as supplement it. Such a possibility can scarcely be denied if all law, including statutory law, owes its authority to one and the same source, viz., the sense of right, as is maintained in this work. So far as the binding force of law is concerned, it makes no difference whether the operations of this sense of right are organized or not. Still, as was emphasized above, it must not be forgotten that in the activity of the organized sense of right both the existence and the content of such a normative sense are clearly manifest, while with the unwritten law this is not usually the case. Hence the burden of proving that statutory law has lost its binding force lies upon those who appeal to a contrary unwritten law. Now it will generally be more difficult to prove this if the legislative authority is adequately organized to express completely the sense of right of the people than if this organization is lacking or defective, or if in certain respects the organization cannot express itself normally.

In the case first mentioned, where there are gross defects in the general organization of the sense of right, the force of unwritten law will show itself especially by setting aside the law-making organ. By means of revolution an unwritten law will be established and a new organ of law set up. Only in this way can the rise of the

Triumvirate in Holland in 1813 and the change in the form of government on the accession of William VI be legally justified. That these changes caused the abrogation of written law is no reason for regarding them as violations of law, for the binding force of the written law had long been lost as a result of changes in the legal convictions of the people and this written law had been able to maintain itself only by the assistance of organized force.

In the second case mentioned above we see the peaceful accomplishment of the changes which occur violently in revolutions. Because a large part of our constitutional law is fixed in a written constitution which can be revised only in a troublesome and abnormal manner, normal legislation is blocked in many fields. Consequently written law cannot keep pace with the changing legal convictions regarding certain constitutional interests. These convictions accordingly find expression in an unwritten law at variance with the written constitution. The best known example of this is the parliamentary form of government which has been adopted in this country in spite of the Constitution and which functions as a legal institution. As a result of unwritten law in this case the king's right to veto legislation and also his right to choose his ministers have been abrogated, though both rights are expressly granted him by the Constitution. A not less significant example is to be found in the relation of the state to education, which since 1889 has become entirely different from that provided by the Constitution. Moreover, the exercise of the right to dissolve the Chambers and the

influence of the electors in determining the policy of the government after the periodic elections rest upon unwritten legal conventions quite outside the Constitution. Many other examples might be mentioned which attest the existence of a living constitutional law standing outside the written Constitution and contrary to it, resulting from the abnormal method of legislation which the Constitution provides for its own revision.

But there is still another way in which statutory law loses its force through the operation of unwritten law: statutory law is simply no longer observed and enforced or only partly so. This is the case, for example, with many French statutes which have never actually been repealed but which are no longer observed. The commission established in 1849 to pass upon the legal force of these statutes remarked again and again that this or that statute had lost its force owing to changed conditions. That this was not always the real reason, however, appears clearly from the fact that some statutes which met an existing need, like that dealing with ferries, were considered binding, in spite of changed conditions which might have been adduced as reasons for regarding them as no longer valid. That some French statutes are still binding while others are not depends upon the fact that the sense of right of the present generation accepts some and rejects others. Again, from the period following the restoration of our independence, we have a clear example in the statute on Sabbath-observance of a law which is only partly observed and enforced because of changed opinions as to what is right.

E. *Statute* (*Gesetz*) *and Law* (*Recht*). If facts such as the foregoing show that an unwritten law is firmly established and that its binding force may be considered to arise from the same source as that of statutory law, the articles [1]) cited above from the statute fixing general rules for legislation are worthless and without any practical significance. The fact is once for all that no one can exercise any control over the working of men's sense of right. The legislator or any other alleged possessor of power is as powerless as a private person to silence the sense of right of any individual whatever. The proposition that custom makes *no* law except as statute refers to it, that a statute can lose its force *only* by a later statute, that the judge shall decide according to statute, is quite intelligible and explicable so long as the fiction obtains that all law is valid only by the consent of the legislator. But as soon as this fiction is discarded and the real authority of the law is investigated, the futility of such rules is obvious. It lies in no man's power to decide what shall have the force of law. For nothing is really *law* except what proceeds from the single source which alone can give a rule the quality of law, the ultimate sense of right. What does not come from this source may be enforced by the power of the state or it may be applied in the decisions of the bench, — it may be what Ehrlich calls the "rule for decisions," — but it is not and never can be law. The modern idea of the state seeks to eliminate from society all exercise of

[1]) Article 3, Customary law is valid only when referred to by statute; Article 5, A statute can lose its legal force only by a later statute; Article 11, The judge shall render his decisions according to statute.

power, all force, all authority which serves any other purpose than the enforcement of law. Its essential content, therefore, lies in the exclusive authority which it seeks to secure to the law. For this reason it is uncompromisingly opposed to the old idea of the state, seen most clearly in the absolute monarchy, which starts from a mechanism of powers (the judges, the police, the army) and identifies the field controlled by these powers with the field of law. There is no doubt whatever that the day of this theory is done, even though it is still frequently defended. The more we perceive the law to be an ethical force, the more the view develops that law has its basis in human nature and does not live upon the sufferance of any organization of governmental powers. Once this is clearly understood, it is impossible to close one's eyes to the broad extent of unwritten law under which society lives; it is equally impossible to trace the binding force of this unwritten law to any other source than that which gives rise to the authority of all other law. The articles cited from the statute fixing general rules for legislation express the old notion of the state which identified it with the organization for the use of compulsion. Whoever can set this organization in motion possesses power and can therefore decide what rules of law shall be effective, to the extent that he uses his power to enforce some rules and refuses to enforce others. As was explained above, this theory of the state undoubtedly had at one time both theoretical and practical significance; even yet it has a considerable significance for many jurists. These consequently define law as something which can be

maintained by force, or as that which the bench uses in its decisions. But this view is untenable in theory and discredited in practice.

It is untenable *in theory* because a machinery of powers is never anything except a machine, a thing without a soul, unmoved by its own inner purpose. To accomplish anything it must be set in motion from the outside and its operations depend upon the person who can manage it. This person is the sovereign, who in the fullness of his power doles out favors and is thought to have an exclusive right to settle the authority of law. So the matter was conceived for centuries and so it is often conceived yet. But if one inquires about the legal title of this sovereign and is not content with fictions drawn from the theories of divine right and popular sovereignty, one finds that in the eyes of the law the sovereign has no title whatever and that the whole machinery which goes by the name of the state is supported only by tradition. It is a bare fact which lacks legal justification. This raises anew the question regarding the basis of the authority embodied in the state. Reflection upon this question leads to the conclusion that the rulership of the state must be founded upon the authority of law alone, and thus we are led to seek the source of this legal authority. The source of legal authority, however, was found in the spiritual nature of man, in a feeling or sense of right inherent in human nature. In this manner the authority of law was made manifest as something autonomous and not dependent upon the operation of any sort of governmental machinery. At the same time,

however, the real purpose of this machinery came to light, viz., that of insuring the rulership of law. This purpose was quite lacking so long as the arbitrary will of a sovereign controlled its use.

Even the organs of judicial authority are beginning to perceive that the governmental organization is naturally subordinate to the law (*Recht*) and not merely to the statute (*Gesetz*). Hence the theory opposed in this work has been discredited *in practice* also. It was like a sudden revelation to discover how far jurisprudence had gone in subordinating statute to law. The judge knew how to hide the fact that he was no longer the slave of the statutes; often he was not clearly conscious of the change himself. For on the surface everything remained as it had always been. The same statutory articles continued to be cited in the decisions, but below the surface a radical change had taken place. By an artificial process of interpretation the rule accepted as law by the prevailing sense of right was injected into the text of the statute. Thanks to an enlightenment which has come to them from every quarter, the judges now know exactly what they are doing and feel themselves called to a new service. In reality, then, nothing remains but to bring them to an open acknowledgment of their relation to the law. They will be brought to such an acknowledgment as soon as they fully realize that their obedience is due to the statutes only because the statutes are a part of the law. If then a statute requires that decisions be rendered only according to the statutes, this requirement cannot be fulfilled because it finds no support in

any sense of right. That any sense of right should not be permitted to express itself or that it should be in any way restricted in its operation is a contention that would undermine the whole foundation of the rulership of law and would bring us back to the notion of a sovereign who can make law without regard to the sense of right in the members of the community. If then the judge is to decide according to the statutes because these are a part of the law, his obligation is exactly the same toward all other law as well. In connection with this theory of the relation of the judge to statutory law, it should still be borne in mind that in applying unwritten law the judge in no way puts himself in the place of the legislator. His office remains what it always was. He upholds a legal relation on the basis of a rule which is already valid. He creates no new law. The difference between the present and the past does not lie in the judicial function but in the nature of the law itself upon which the judge is permitted to base his decisions. According to the modern idea of the state, the judge must take all law into account, however it may have originated, and including therefore the unwritten law. According to the theory that only the sovereign's law is valid, he could take account of unwritten law only so far as the statutes permitted. The controversy about the freedom of judges toward the statutory law may be reduced to this simple formula.

XV. *Strengthening the Authority of Law.* A thoroughly primitive community has a legal system which, so to

speak, works automatically. The mental life of the individual is as yet so little differentiated that almost the whole business of his life is controlled, along with that of others, by the communal mind. Individual forces in opposition to this communal mind show themselves only in a very small degree. Hence there is no special need to neutralize these opposing forces in order to strengthen the authority of the group. If it appears from the conduct of the individual that he cannot submit to the communal mind, he is expelled from the society.

This condition changes in proportion as the individual frees himself from the collective mental life and develops a mental life of his own. In so far as individual modes of conduct are contrary to the rules of the community and thus tend to undermine the authority of these rules, it becomes necessary to curb anti-social impulses and thus to strengthen the authority of the communal order.

A. *The Administration with reference to Punishments and Judicial Executions.* Punishments and judicial executions have been from antiquity the means of attaining this end. Not that these are the only means of inducing obedience to the law; there are many other motives which strengthen obedience, such as private interests, social conventions, etc. But punishments and executions have always been the means which the legal system itself has possessed of strengthening its authority and of imbuing the individual mind with the necessity of the communal life, in so far as the sense of right does not suffice to bring every one to an observance of the rules of the community.

One part of the legal order, therefore, contains an organization for applying punishments and enforcing executions. This part provides for one of the oldest public interests, almost as old as the military interest which is concerned with enforcing the independence of the community. Law-making by legislative assemblies represents a public interest for which adequate legal provision has been made only since the introduction of the constitutional system and which is therefore scarcely a century old. But almost from the time the state came into existence the need of strengthening the authority of law, however made, appeared as a pressing public interest. To meet this need and to provide for this interest, an organization was called into being which operated by means of punishments and executions, together with the judicial process connected with them. The strengthening of the authority of law necessitated an organization of power, precisely as the interest of the community in protecting its own independence required a mechanism of force. The development of this organization of power has been regarded as the essence of the idea of the state and primarily for this reason the state has been looked upon as a manifestation of force. As a result, the concept of a sovereign endowed with an inherent legal authority was made the basis of the whole theory of the state. Hence the notion is still prevalent that real rulership lies in control over this organized power. Thus the authority of the law is not only excluded but its binding force is made to depend upon its enforcement by this organization of power.

In opposition to this view it is to be noted in the first place that the means of compulsion by which punishments and executions are applied are themselves rooted in the law, for the exercise of compulsion and all that goes with it, such as judicial process, originates in legal obligations. In this case also we are dealing with a system of law, which however operates only in a subsidiary capacity; that is, it functions only in case of a violation of the social order which is binding upon the citizens. The authority of this social order is thus supported by another order. But *quis custodet custodes ipsos*? Is a third legal organization of a still more subsidiary kind to be created, the operation of which is dependent upon violations of the preceding order? Legal order might thus be piled on legal order without reaching an assurance that any of them would ever be obeyed. We have to look about therefore for some extra-legal sanction in order to secure obedience to the legal system by which compulsion is applied. What is this extra-legal sanction by which those entrusted with enforcing the law, with police and military duties, are induced to fulfill their legal obligations, if the legal character of these duties is not itself a sufficient motive? This sanction has been found for ages in the fact that their personal interests are involved in the performance of their duties. This is effected by making this sort of public service a vocation and means of livelihood. In other words, office holding is established as a social and economic profession.

The oath is another method, formerly more used than now, of insuring the performance of their legal

duties by officials. But this method has a meaning only for those who swear a real oath when they call upon the name of God. Such a person as a rule believes that the breaking of an oath involves divine penalties of a fearful nature and this belief may offer a guarantee that he will perform his duties. However, the questionable side of this mode of strengthening the law lies in its use to uphold a statute even after the statute has lost its legal character. Thus for religious reasons rules are obeyed which are not rules of law, or which actually run counter to the law. This is seen most clearly in the case of the constitution where, because of the difficult rules for its revision, there is often a wide discrepancy between its requirements and those approved by the popular sense of right. Experience shows that in the long run the sense of right triumphs over the oath. The article on education in our Constitution is an example of this.

When the official's legal obligation is supported by a simple promise, it is at most made more clearly conscious; there is no essential strengthening of the obligation. When a promise is frequently exacted, however, this suggests that the obligation to obey a rule of law depends upon the will of the individual, which impairs the independent, objective validity of the law.

The most important means for securing the enforcement of the law and the means which are generally effective lie in the fact that the personal interests of the officials coincide with the performance of their duties. These interests are represented mainly by their economic and social position. The special sanction thus

given to the performance of the obligations imposed upon officials, however, makes the organization of these persons who exercise compulsion a great social power. This may become inimical to the exclusive supremacy of the law if it is applied to other than legal ends. This possibility arises when a refusal to use the agencies of government for ends other than the administration of law puts the officials in danger of losing their places and thus menaces their private interests. The only way to guard against this is by so fixing their legal status that they are not dependent upon particular persons for the retention of their offices. So long as this is not done there exists a center of force which contains a threat to the authority of law. The mere existence of such a force based upon a personal hierarchy gives support to the notion of a sovereign, an extra-legal state power outside and opposed to that which exists in the legal order. The military organization in particular has fostered this notion, since the army is the greatest and most powerful instrument of force. Formerly this was more the case than it is now. For in the past the army was composed of mercenaries and the service of arms was a source of income or a profession. The prince controlled the persons engaged in it by means of the economic interest connected with the profession. Now however mercenaries have been replaced by a citizen soldiery and the duty of military service has become a very oppressive burden. Every effort has been made to strengthen this service by rigid military discipline, but as a mere instrument of compulsion the importance of the army has declined, because private interests are no

longer concerned in the performance of this duty. Thus if the army were now to be used to uphold a system which had lost its binding force among the people, its unsuitableness for such a purpose would appear at once, in spite of the fact that personal subordination in the army is pushed to the point of destroying individual initiative.

Though the army is less an extra-legal "power of the state" now than in the past, the idea of such a power still persists, especially where there is a profession devoted to the exercise of compulsion. This is clear from the continual appearance of ideas and conduct which aim to allow the professionalized organization of compulsion to act according to a special system of its own outside the ordinary law. In order to assert the independence of the sovereign authority, which usually meant the personal power of a prince, and also to strengthen it, the political theory of absolutism first placed the authority of the prince outside the ordinary law and then admitted his competence to create a law of his own for the interests entrusted to his care. Recent political theory has transferred all this from the prince to "the state." It therefore holds that the state "as such," — which means the organized machinery of power, — is not subject to ordinary law and that this "state as such," entirely independent of law, possesses an absolute superiority over its citizens. This does not indeed prevent the state from standing in legal relations with its citizens, but it does mean that these relations are essentially different from those controlled by ordinary law, because the subjects of these relations are

unequal. In this way a distinction in principle was made between public and private law, the ordinary law being limited to the latter. If this opposition be assumed, those persons who are commissioned to exercise compulsion are subject to public law. This gives rise to the following results:

1. *As officials* these persons share the favored status of the sovereign, who stands outside ordinary law and who is therefore not subject to the ordinary rules of responsibility. This notion gives an enduring support to the conception of the state as a manifestation of power clothed with inherent authority. This conception of the state leads finally to the conclusion that, since the state has the task of administering the law, it also decides what has the force of law.

2. *As private persons* these officials occupy a position of legal inequality in relation to the sovereign and therefore this relation cannot be said to be the ordinary one of master and servant. The denial of such a relationship, however, places the official in a position of thorough-going economic dependence upon the state. Any possible opposition to rendering services outside the law can easily be broken down.

The theory of the state advanced in this work can recognize in the mutual relations of men no authority other than that of law. It therefore denies the existence of a sovereign having inherent power and rejects the opposition between public and private law. For the basis of this distinction is the assumption that the status of the parties is in the one case that of equality and in the other that of superior and inferior. The structure

and functions of the agencies by which punishments and executions are enforced arise from legal obligations of precisely the same kind as all other legal obligations. Hence it makes no difference whether these obligations arise from the ordinary law or from special systems of law. They serve to strengthen the authority of the law to which the citizens are subject. For their own part they are guaranteed not by a third system of law but by an extra-legal means which the law utilizes to insure the performance of these executive duties, viz., the dependence of the private interests of the officials upon their performance of these executive duties. But if this means is not to defeat its own purpose, it is necessary to insure the economic and social position of officials by law in such a way that their own opposition will prevent the use of their services for any end other than the administration of law.

B. *The Further Task of Administration.* The same extra-legal guarantee for the fulfillment of legal duties is found also in the law which governs the further administrative tasks of the state, such as the health service, education, water-supply, the care of streets, etc. Here also the various kinds of work required became professions and the legal duty was thus strengthened in the way described above. But in the case of these administrative tasks the prevailing theory of the state was always somewhat confused. The sovereign was clearly not in evidence here and there was no exercise of compulsion. This whole field, therefore, was considered as belonging to the sphere of the state's activity under private law. The persons charged with such work

were sharply distinguished from those who had to perform the tasks of sovereignty. Only the latter were "officials" and had a share in the privileged status of the sovereign. But with the extension of the state's administrative duties, and particularly after special systems of law had grown up for these purposes, it could scarcely be held that this field of interests belonged essentially to private law. The criterion which had been employed for distinguishing officials from those who were not officials, — that is, the nature of their duties, whether "sovereign" or "technical," — had to be abandoned. The whole field of administration was regarded as part of the work of the sovereign and was therefore incorporated in public law. Thus substantially the theory of the state had freed itself from the *old* notion of sovereignty, because in the majority of administrative acts there was no exercise of power whatever. Political theory was unable to solve this contradiction without denying its own foundation, the notion of sovereignty. Equally insoluble was the question how those "administrative" tasks of the sovereign were to be distinguished from these activities carried on in the name of the state under private law. The post-office was a branch of the public service and by analogy so also were the telegraph and telephone administrations. But the administration of railroads and mines by the state was something new. In this case one felt oneself to be on uncertain ground. The uncertainty became greater as the field of operation of local government became more extended. Markets, stock exchanges, public scales, communication by land and water, as old

institutions, might be regarded as belonging to the public services. But what about the administration of gas-works, water-works, bath-houses, reading-rooms, agricultural banks, and all the other activities which had formerly been conducted by private persons and for which the private law was in force? Could these really be called public services, and if so, was the local government then partly freed from the rules of private law?

Practice does not preserve distinctions merely for the sake of some theory and permits like things to be treated alike. If the theory of the state is freed from the notion of compulsion attached to the sovereign, there is no further difficulty in the way of putting the task of administration in its proper place. The most ancient interest of the community, which for centuries was considered as almost the only public interest, is the preservation of order, peace, and security, and this made necessary an organization of agencies for the exercise of power. We know now that the whole machinery of judges, bailiffs, wardens, police, and army is rooted in a legal system which prescribes the duty of exercising compulsion as a public service. We know also that this implies no special kind of authority and that accordingly no sovereign authority need be imagined to care for these interests. Other public interests are gradually added to this primitive one. New legal obligations are imposed and where special systems of law come into existence, new powers appear not known to the ordinary law. There is no essential difference, however, between the legal obligations imposed in the two cases, any more than there is an essential dif-

ference between services to the community performed by public agencies and those performed by private agencies. All legal obligations have the same basis and must have in order to be *legal* obligations. All the services required by the interests of the community are *public* services, precisely because they are thus required and only for this reason. And finally, it is a matter of complete indifference whether the powers needed to care for public interests are created by the ordinary law or by any of the special systems of law called into existence in behalf of these interests and which collectively constitute the *public* law. Hence it is also a matter of indifference whether or not these powers are the same as those which private persons may exercise. All these distinctions, which are now disregarded in practice, become worthless for political theory also, as soon as the notion of an authority outside the law, the sovereign, is discarded. In order to explain the extension of the functions of the state, therefore, it is not necessary to widen the old concept of sovereignty to make room for administrative activities. On the contrary, the former functions of the sovereign are to be considered as part of the public administration, which in all its aspects can be conducted only on the basis of law and in accordance with either the ordinary law or some special law.

To sum up, therefore, we can say that one part of the legal system, that under which the people live, finds its sanction in that branch of the administration which enforces punishments and executions. Another part of the legal system, that which contains the duty of per-

forming all administrative tasks, including the one just mentioned, finds its sanction in the personal advantages which those charged with the administrative duty derive from its performance. But there is no sharp distinction between these two sanctions. The observance even of that part of written law which governs the administration is often secured through the force of executions and punishments, but in the last resort the sanction of this sort of law is to be found only in the stimulus of the private interests of administrative officials. On the other hand, many legal duties which are ultimately secured by executions and punishments have an additional sanction in the stimulus of private interest.

Consequently the law makes use of two agencies to secure the performance of legal obligations, compulsion and private advantage. Force is used for the most part where the legal obligations involve a certain sacrifice of freedom and where this sacrifice is equal for all concerned. When the sacrifice exceeds this degree or is very unequal, some compensation will be needed to insure the performance of the obligation.

Nevertheless both these agencies fail to reach their goal if the real basis of legal obligation is lacking and if something is demanded which has no support in the people's sense of right and which therefore is not recognized as having the force of law. It follows from this that the whole legal system under which a people lives finds the basis of its authority, its binding force, and its effectiveness in the operation of the feeling or sense of right.

CHAPTER IV

THE MAKING OF LAW

I. *Law-making as an Intellectual Process.* So long as the idea of sovereignty alone was dominant, it was accepted as self-evident that the imperative character of the law was derived from the sovereign, whether it were king, parliament, people, or state. Because of the sovereign's inherent right to authority, his will was positive law (*Gesetz*) and as such embodied principles of right (*Recht*). The legislator, therefore, appeared as the constructive sovereign who has called the law into existence.

The Positive School of Jurisprudence was content with this explanation of the imperative nature of law and of the way in which it originated or became effective. What the law might be over and above the will and wisdom of the legislator, was regarded as belonging to the less important fields of politics or legal philosophy. For "practical" jurists law was the command of the sovereign and nothing more.

It followed from this view that when the sovereign, who was personified as an imaginary "legislator," had not spoken there was no law. But it is impossible that there should be gaps in the law. Therefore, howsoever the sovereign might have spoken, the law which was promulgated by him must be looked upon as complete,

a requirement which could be met only by developing the sovereign's law into a *system* from which any missing rules might be derived by a process of deduction. The chief task of the jurist, therefore, was the *construction of a system of ideas* to be incorporated in the law of the sovereign. Miracles of analysis and synthesis have been wrought in this field, and for many years this satisfied the need of expanding the sovereign's law into a legal system adequate to the great variety of social relationships. The law, therefore, sprang from a two-fold source. First, it was derived from the will of the sovereign, which was to be found especially in the statutes. And second, it came from the juristic system which was constructed with more or less skill to fill in the gaps in the statutes. It was assumed that the legislator had developed his law systematically, though without stating all the details. The second source of law, the system, was especially the product of a purely intellectual process. The creation of a system of law is indeed a strictly rational achievment. And since this system, after it had once been created, extended its control even over the content of the statutory portion of the law, it followed that jurisprudence operated in the main with rules which derived their value particularly from their *logical* connection with one another. These rules, derived by purely rational methods and marked by their logical character, controlled the life of society in all its variety and all its conflicts. The opinions of lawyers, the advice of notaries, the decisions of judges were all steeped in the idea that the law was to be mastered only by a series of syllogisms.

Among jurists, therefore, the supreme qualification was dialectical skill; and in the court-room, the best chance of winning his case lay not with the man who appealed to the judge's sense of right, but with the man who knew how to fill the judge's soul with the logical beauty of the law for which he wished to gain a hearing.

II. *The Influence of Codification.* This conception of law, as a substance produced by the legislator and worked over by the dialectical ingenuity of the jurist into a legal system comprehending all the relationships of life, was doubtless strengthened, though it was by no means created, by codification. In the main the law taken over into the codes had already been worked together into a system by centuries of juristic manipulation. Codification merely made it easier for the jurist to work toward the architectonic completion of the law and in fact he has devoted himself to this task to the point of intellectual exhaustion. Indeed codification has been recommended as a better means for system-making, and in this respect it has answered its purpose. It was also expected, however, that it would make the law more accessible to the people. This goal has not been, and could not be, achieved, for codified law was jurists' law and has always remained, as it still does, mostly outside the layman's world of ideas and feelings.

III. *The Revolution in Criminal Law.* This conceptual jurisprudence, which derives the validity of the law from the will of the sovereign and evolves its content

dialectically into a chain of concepts, received its first serious setback in the field of *criminal law*. The treatment of crime as a juridical phenomenon was so opposed to its social significance that it brought clearly to light the conflict between theory and life, between the positive law and the fundamental principles of right. And yet there is no branch of the law where the congealing of social life in constructions, concepts, and analyses has proceeded to such a point of artificiality as in criminal law. Social maladjustments, though in such examples as theft, homicide, and murder they are as old as the world, are described in the criminal statutes of our time by enumeration of their "elements," whereby criminal law loses all its flexibility. The responsibility of the culprit is a factor which one would think could be determined only by the aid of individual and social psychology. But the question is reduced by the law to certain juridical forms, to a limited number of kinds of guilt and intention, by means of which the responsibility of the culprit and the degree of his punishment are decided. Indeed guilt is limited to a number of forms of participation in the commission of a crime, such as being the actual perpetrator or being an accessory, inciting another to commit the crime, etc. Thus juristic ingenuity must again be urged to unfruitful intellectual efforts, first to set up concepts and then to determine from them who are included in the circle of possible criminals.

The recent tendency in criminal law indicates clearly that this artificial juristic apparatus was in no position to accomplish the repression of crime expected

of it and that under these circumstances the question of a *just* repression could scarcely be raised because of the predominance of juristic constructions. The newer tendency, in breaking away from juristic dogmatism, proposes that the science of criminal law shall set itself the task of investigating the worth or worthlessness of the *individual* as a social being, disregarding the criminal act as an occasion for juristic hair-splitting and viewing it solely as a symptom of a possible deficiency in the social worth of a particular person. Such a deficiency may eventually offer the occasion for applying various means in order to guard against and avert social maladjustments in the future. The science of criminal law is thus transformed from a juridical-dogmatic science into a *science of valuations* which conceives and treats criminal law as the result of an appraisal of social interests. Thus in this field the decisive qualification for both legislators and judges is not a juridical intellectualism, but the ethical point of view which lies at the basis of this appraisal of interests.

IV. *The Revolution in Private Law.* At about the same time, that is, in the seventies of the last century, the lack of concord in one notable respect between legal concepts and actual life was demonstrated in the field of private law. Professors Fockema Andreae and Hamaker in the Netherlands, and particularly Schlossmann in Germany, proved that the idea of contract which was current in legal science and the actual contract recognized as binding in business could not be brought into harmony. According to scientific theory

the intention of parties with reference to the agreement of their wills (the meeting of minds) must coincide. But in practice hundreds of cases of contractual obligation were recognized as binding in which there was not only no proof of such a coincidence of intention, but in which the absence of any psychological agreement, or meeting of minds, between the parties was manifest. The rationalistic jurists then as always took the side of scientific definition and demanded, quite in harmony with the coercive tendency of conceptual jurisprudence, that practice should conform to definition. But the interests of business were so opposed to this scholastic yoke that the old theoretical idea of contract had to be abandoned. Obligation was admitted to exist wherever the conduct of the parties in concluding an agreement furnished a sufficient reason for regarding them as mutually bound. It accordingly made no difference whether the legal act was considered a contract or not. This case is significant because for the first time a right based on the value of interests (in this case, business interests) was decisively preferred to another principle of law justified only by its conformity to a system which had been intellectually incorporated in the statute.

This revolution in jurists' ideas was not accomplished as suddenly as might be inferred from the account given above. Ihering took the first essential step in this direction when, in the last volume of his *Geist des römischen Rechts*, in discussing the theory of law, he made human *interests* the crucial point instead of human *will*. His famous definition of rights as "legally pro-

tected interests," [1]) opened up in a few words a view of the real significance of law which induced him to turn his back upon rationalistic jurisprudence and to seek to bring legal science to a higher plane than that upon which the Pandects had placed it. His *Zweck im Recht* embodies this attempt, but the pregnant idea which was suggested in the earlier work of seeking the essential content of the law in protected interests was not fully developed. He was not able to free his mind from the dialectical method, which he frequently used, although he criticized it. Consequently this work, so great in its conception, is filled with the same dialectical gymnastics which have brought the "juristic method" into disrepute. For this reason it was not able to contribute to a deeper insight into the true meaning of law.

But Ihering's "legally protected interests" were not lost, and there gradually developed from this idea the important principle that the law discloses a *judgment of value* concerning *interests*, that in this judgment the moral nature of man is expressed, and that, as a consequence, law-making is not primarily a juridical but an *ethical* process.

V. *The Influence upon Judicial Decisions.* There can be no doubt as to the influence of this view upon the courts. Their work was raised to a higher plane when the logical method of establishing statutory law was placed at the service of that which exists as living law independent of the statutes. A mere logical deduction

[1]) Sect. 60, Ed. 4, Part III, p. 339.

would no longer suffice, when the result ran counter to these living principles of right. And so the concepts and the system were transformed until a foundation was reached on which the real law could be advanced by means of the syllogism. At first the judge was unconscious of all this; instinctively he brought to the front another law than the original statutory law, while he imagined that he was merely applying another means of interpreting the latter. [1]) Finally as a result of all this, jurisprudence went so far in giving validity to rights other than those of statutory law that recognition of the influence of the modified interpretation could no longer be withheld. This modified interpretation of law, however, has not attracted so much attention as the position which the judge has come to occupy with respect to the legislator. Under the mask of interpreting the statutory law, it was believed that he had begun to set himself up as a lawmaker and so a justification was sought for the entrance of the judge into a field which was not properly his. In this way investigation was thrown upon a false scent. For it was not the activity of the judge which had undergone a change, but the point of view from which the statutes were considered as the source of law. The judge had begun long before to apply unwritten law, but in this he had not transgressed the limits which in general are proper for the judiciary, viz., the applying of an already existing law and not the producing of a new one. The innovation, therefore, lies in the fact that the legislator's monopoly of the law is no longer recog-

[1]) François Gény, *Méthode d'interprétation*, 1899.

nized. But this view can be maintained only on the assumption that the rulership of law springs from the sense of right which resides in men, in other words, from our moral impulses which react upon external conduct and cause us to subject the interests concerned in this conduct to an evaluation. By his altered manner of dispensing justice, therefore, the judge has merely placed himself within a much more inclusive world of norms than was the case earlier when statutory law was supreme. His activity has remained the same; he has not become a law-maker. It is quite comprehensible and altogether justifiable that the judge has not yet publicly announced that a newly discovered mine of law is being worked, for a new way of thinking has a better chance of being accepted if it fits into the channels of thought to which the circle affected is accustomed. And since this circle is accustomed to establish law by means of logic, the modern judge works continually with concepts and with the system of statutory law, though in reality he applies the living principles of right, even when they fall outside the statutory law.

VI. *The Idea of Sovereignty and Constitutional Law.* At the same time that rationalistic jurisprudence was being displaced in criminal and private law, it was beginning its work in the field of constitutional law. An untilled field lay open here which was cultivated by Laband with unmistakable talent in his *Staatsrecht des deutschen Reichs,* which first appeared in 1876. As a result of his work this branch of the law also was

brought under the yoke of a conceptual system. The point of departure was, and remains, the idea of sovereignty, i. e., an extra-legal competence to issue commands which is exercised in the name of the state. Since, therefore, ultimate authority is not found in the law, but on the contrary the law derives its validity from the state, one cannot properly speak of a science of the *law* of the state (constitutional law), but only of a science of the *power* of the state (politics). Hence the idea of power permeates the constructive conception of the state which has been developed by the juridical method. The organism of army and navy is a part of the state's power (military force); the finances form another bit of power (financial authority); the police represent still another (police power); and the administration of justice makes still a fourth block of power (judicial authority), etc. The state falls apart into a series of authorities. Indeed, the legislative authority itself is merely a part of the state's power,—that part, namely, which regulates relations between parties and therefore, as it is said, concerns itself with principles of right. For all these authorities there is no common basis except that collectively they are to be derived from the state. According to this mode of thinking the state is, however, a mere abstraction, since reality lies in the various separate powers, each of which is devoted to a specific task. It is just these tasks, and not the law, that brings their competence to light, since the law has no authority of its own. If this premise were strictly maintained, constitutional law would become a purely descriptive science. As a matter of fact, however, it has

gone one step beyond this, and has recognized the law as a regulative power independent of the state. Consequently Laband could write the words which we have quoted in our Introduction: "The state can require no performance and impose no restraint, can command its subjects in nothing and forbid them in nothing, except on the basis of a legal prescription." German political science, however, has not become clearly conscious that in recognizing this it must abandon the idea of sovereignty, of the inherent authority of the state. It has maintained that idea with a twofold result. In the first place, political theory operates with a dual authority. When there is a definite statutory provision, the authority of the law has the upper hand; but when the law has not been embodied in a statute, the authority of the state is predominant. In the second place, the assistance of juridical dialectic must be invoked to resolve the contradiction of the twofold ultimate authority, that of the state and that of the law. From this point of view the fiction which has been offered regarding the concept of statutory law is extremely instructive. If the law is assumed to be an authority binding even upon the state, the statute is regarded as a rule of right. If, however, the state is assumed to be a power which endows the law itself with binding authority, then the statute must be regarded as a regulation established with the co-operation of the representative body. It follows that in the first case the force of the statute springs from its content as a rule of right; but in the second case the force of the rule of right springs from the fact that it is embodied in a statute. This con-

flict is concealed by taking refuge in the distinction between a formal and a material meaning of the word statute. Thus the attempt is made to justify the use of the word as meaning both a form of expressing the state's authority and a rule of right. In the seventies of the last century, Laband used the freedom thus obtained to champion the financial independence of the government against the representative body in connection with the conflict over the budget which some years earlier had been waged between Bismarck and the Prussian Landtag. Thus the budget was said to be a statute in a formal sense, but in its proper or material significance it was to be considered an administrative ordinance which in principle fell under the competence of the government. And then this ambiguous distinction was gradually extended over the whole field of constitutional law in all German treatises, thereby concealing the double premise of state authority and legal authority.

The principle that in constitutional monarchies the king is the single and exclusive bearer of the state's authority is another proposition that smacks of politics. Through this fiction the significance of the representative body in connection with law-making is falsified, and at the same time, especially in countries with parliamentary governments, the rôle which the king plays in this function is completely misconstrued.

There is another respect in which the unreality of juristic dialectic affects constitutional law.The fundamental principles of this law are formulated in a constitution which can be revised only by a different and

more elaborate procedure than is required for other legislation. Consequently it is much harder to make needed changes in constitutional law than in other positive law. Thus, as has been shown above, these changes are made by an extra-legal process, since an unwritten law develops as the result of the unorganized sense of right. But German political science refuses to take account of such a means of legal development, because it recognizes no other kind of law than the law of the sovereign. Consequently the law *must be* found in the constitution. And, in fact, this law *is* found in the constitution, if one only understands the art of distorting the prescriptions of the constitution or of so transforming their sense, by means of adroit dialectic, that the new unwritten law can parade as constitutional law. Numerous examples of this method are to be found in Holland, as we have shown in another work. Here also adherence to the idea of sovereignty leads to the falsification of a part of the written law and also gives countenance to the belief that, by exercising the necessary intellectual ingenuity, one can manipulate the law at pleasure. But this juristic intellectualism robs the law of all its ethical value, and the science which lends its authority to such a method is guilty of a pernicious error.

VII. *The Idea of Sovereignty in Administrative Law.* Not less confusing to an insight into the real course of affairs is the adherence to the idea of sovereignty in the field of administrative law. This branch of the law is not regarded as a complex of rules representing the re-

sultant of a valuation of interests, — other interests perhaps than those regulated by private law. On the contrary, the idea of sovereignty destroys the essential unity of the law by introducing a fundamental distinction between private and public law. A certain preference in the eyes of the law is ascribed to the interests of the sovereign as against those of citizens, just because they are the interests of the sovereign. Thus legal relationships in this field, unlike those in private law, have not been constructed upon the assumption of the equal value of interests in the eyes of the law. Hence the importance of administrative law does not consist in recognizing the legal value belonging to public interests, but rather in a *limitation* of the superior value which these interests originally possessed. Thus in principle the sovereign derives his competence not from the law, but from the fact that he is the sovereign. It follows from this that independently of the law the sovereign may foster public interests by any means, even by limiting the freedom of the citizens, in so far as he has not been forbidden to do this by the law (that is, by the statutes).

In another work [1]) we have shown that the distinction in principle between public and private law is untenable. Independently the same point has been strongly emphasized by Van Idsinga in the Netherlands, and by Ehrlich, [2]) Weyr, [3]) and Hans Kelsen. [4])

[1]) *Lehre der Rechtssouveränität*, 1906.

[2]) *Theorie der Rechtsquellen*, 1902.

[3]) "Zum Problem eines einheitlichen Rechtssystems," *Archiv für öffentliches Recht*, Vol. XXIII, 1908, p. 529.

[4]) *Hauptprobleme der Staatsrechtslehre*, 1911.

This distinction stands or falls with the idea of sovereignty. Our present work offers a thorough-going cricticism of the idea of sovereignty as the corner-stone of constitutional law. Therefore we need not explain again the misunderstanding of the nature of administrative law which is connected with this idea. According to the modern idea of the state, which recognizes no other authority than that of law and leaves no place for a self-justified sovereign, there is no distinction in principle between administrative law and private law. The former evaluates other interests than those which the latter appraises; in both, however, a preference for any given interest can spring only from a legal valuation. Thus we stand upon the firm basis of reality, which knows no authorities and no preferred interests standing outside the law.

Otto Mayer's *Deutsches Verwaltungsrecht* is the clearest example of the way in which this "right to authority" standing outside the law is treated under the guidance of the idea of sovereignty. In this work authority has become a substance which can be disposed of as if it were a piece of real estate. Let the reader judge for himself: "Within its territory the state is the sole source of public authority; all other power, to whomsoever it may be attributed, is derived from the state alone, is *a power emanating from the public authority* of the state."[1]) And again: "*A part of the public authority*, an exercise of power belonging to this authority, is detached and placed in the hands of the subject, so that he may be master of it and may use it for himself, in

[1]) Vol. I, p. 112.

his own name and for his own interest." [1]) This is the spirit, — and it reappears with only verbal changes in the second edition (1914), — in which German administrative law is set forth, and thus jurists are initiated into a public law which may be asserted throughout to be an alternation between concepts which have no reality and terms drawn from an obsolete political theory. For example, in the treatment of property in public law we find the following definition: It is such a control over a thing "that the public administration, as such, is identified with this control; the control, instead of serving as a means to public administration, *actually embodies public administration.*" [2]) But what has the law to do with the control over a thing, and what fruitful idea is contained in the notion of a thing which embodies the public administration? The use of terms drawn from an obsolete political theory may be seen, among other examples, in the maintenance of the opposition between the legislative and executive authorities, each of which is equipped with special "powers" and "characteristics." Thus the "pre-eminence" of statute, the "reservations" in favor of statute as against executive power, and the "binding force" of statute are set over against the "mode of origin," the "capacity to act," and the "possibility of being legally bound" of the executive authority. [3]) The powers and characteristics of the executive and legislative authorities are treated under these obsolete categories without

[1]) *Ibid.*, p. 114.
[2]) *Ibid.*, Vol. II., p. 74.
[3]) *Ibid.*, Vol. I, p. 71, and Vol. I, (Ed. 2), pp. 65 ff.

any inner connection. Such a work as this, which in its fundamental ideas deals with trivialities in a thoroughly scholastic and dialectical fashion, offers a disheartening example of rationalistic jurisprudence in the field of public law.

VIII. *The Hybrid Character of the Systems of Constitutional and Administrative Law.* It can scarcely be denied that a fundamental clarifying of ideas is needed in the field of administrative law no less than in that of constitutional law. This is possible, however, only if the idea of the state is sought not in the authority of a sovereign but in the authority of law, and if the hybrid character of both systems of law is abandoned. The old political theory which preceded the appearance of the theory of the legal state (*Rechtsstaat*) operated exclusively with the idea of sovereignty and therefore with authorities established by nature. But in this it was at least logical and did not demand that the sovereign should subject himself to law. So far as the rulership of law was recognized, there was indeed no sovereign but something different, the state-fisc. It is true that it might be argued against this theory that it proceeded from a twofold conception of the state; but once this duality was recognized, the relationship of the state to law was clear and definite.

The theory of the legal state brought out the idea that the sovereign also is subject to the law. But this idea introduced the greatest confusion into political theory, since now two authorities, the law and the sovereign, are in conflict. If the idea of sovereignty is maintained in

its integrity, i.e., the idea of a source of authority standing outside the law, it is impossible to explain the subordination of the sovereign to the law. If the law is recognized as an ultimate source of authority, it is not permissible to maintain the idea of sovereignty. Nevertheless both ideas are maintained, with the necessary consequence that neither constitutional nor administrative law, lacking a secure starting-point, is capable of being reduced to a system. Sometimes powers, like those of the police and the army, are derived from the authority of the sovereign; sometimes, and especially in the case of the ordinary business of administration, the law is invoked as the basis of power.

Constitutional and administrative law can be rescued from this morass only by returning to the old political theory of the police state or by going forward to the new political theory which accepts no authority as valid except that of the law. A compromise is impossible; and since political fact has outgrown the theory of the police state, the actual course of affairs can be understood and guided only by holding fast to the one title to authority which has survived the overthrow of sovereignty, viz., that of the law. If this is done, all those authorities which fill the literature and which still survive in words as relics of the police state will be dissolved into a complex of rights and duties evoked in behalf of various public interests by the action of the social sense of right, either organized or unorganized. This sense of right is a real authority and the only real authority, because obedience to its commands is not imposed by constraint but is freely given.

IX. *The Logical Consequences of the Old and New Political Theories.* The opposition in principle between the old and the new theories of the state and of law gives rise to numerous consequences which in conclusion we shall summarize under five points.

A. *The Binding Force of Law.* The old concept of the state and of the law required a sovereign placed over against the people in order that the law might be valid. This sovereign established the law for all those who were subject to his authority, and in consequence there could be no other law than that of the sovereign. Now the law is admitted to be a norm which gets its binding force from the spiritual nature of man, viz., from his sense of right. With this view the sovereign disappears as a source of law from both legal and political theory.

B. *The Monopoly of Law.* Under the domination of the idea of sovereignty, the law was formerly monopolized by the sovereign. In case there were gaps in the statutes, one had to take refuge in the notion of an omniscient legislator in whose subconsciousness numerous rules were concealed which might be brought to light by means of dialectic. At the present time the field controlled by statutory law is limited to those interests which actually lay within the ken of the legislator at the time the statute was enacted, and to these interests only in so far as they were envisaged by him. On the other hand, the unwritten law supplies the rule for all other interests and cases. This unwritten law is, indeed, the result of the same process which lies at the basis of legislation; the latter represents merely the action of the organized sense of right. In this process

the valuation of interests which the legislator has not acted upon, or has only partially regulated, is of the same kind and takes place according to the same standard as in the case of matters openly settled in parliament.

C. *The Continuance of Validity.* Formerly the statute had unlimited validity. If the sovereign had not expressed his will to the contrary, the statute was enforced, though it had to be accompanied with the pious ejaculation, *lex dura sed ita scripta,* and obedience was demanded though it was not always accorded. At the present time, it is perceived that the basis for the validity of statutory law lies in a valuation of interests, which is not made merely on occasion within the walls of the parliament house; the citizenship in the full circle of its social life is continually participating in this valuation by applying the standard of its legal convictions to various interests, even to those which have already been appraised in the written law. Consequently the entire mass of the law is a living organism, whose parts die or are renewed when other legal convictions come into control than those which prevailed when the statute was enacted or the law created. It is a living process whose development no power in the world can check. It is true that for a certain period the original life can be artificially maintained. Something which elicits no response from the people may be temporarily preserved as a force in social life. But the utmost efforts in this direction accomplish nothing except that, when the tension between statute (*Gesetz*) and right (*Recht*) has become sufficiently acute, the

existing order is disrupted by a revolution. Thus the legal convictions whose authority was denied recognition in a normal fashion are nevertheless made effective.

D. *The Interpretation of Statutory Law.* So long as the law was regarded as a product of sovereign authority, the *purpose* of the legislator was deemed an important consideration in fixing the content of the law. Accordingly every means was employed to trace out this purpose in order that it might serve as a guide in interpreting the statute. At the present time we know that if the statutory law is allowed to retain the force it was originally intended to have, the legal convictions of earlier generations frequently remain in force though the present generation no longer feels them to be valid. The real basis for the rulership of law is thus undermined, and also the right of every generation to live according to its own ideas of right, its own legal convictions. In the latter case it is not out of place to speak of a right which is born with us. The present belongs to us completely and wholly. We repudiate entirely an appeal to the judgment of history. When a higher sanction is sought by means of this appeal for a law which no longer reflects the vital convictions of the people (as, for example, when it is said that God reveals himself in history), this is preaching submission when resistance ought to be urged. Resistance is necessary to liberate our feelings, thoughts, and wills from the yoke of history and tradition, which hinder the birth of a matured spiritual life.

E. *Judicial Decisions.* Finally the new political and legal theory places the work of the courts in another

light. As in the case of law-making, rationalistic jurisprudence has never seen anything in judicial decisions beyond an employment of the intellect. The chief result of this was to deduce the law for each concrete case from the statute by a logical method. Just as the rule derived its importance from the place which it occupied in the "system," and thus had primarily a logical-juridical value, so the judicial decision by which the rule was applied was the product of intellectual activity and reducible to a syllogism.

The work of judicature assumes an entirely different aspect, however, when one accepts the view that the statute is merely a part of the living law and that all law is to be looked upon as the result of an evaluation of interests. Even when one takes the rule embodied in the statute as a starting-point, its adjudication is still infinitely more than syllogistic deduction, since this norm contains a judgment about a conflict between interests abstractly conceived. The judge has to decide the same conflict, but between concrete interests, and accordingly, even with reference to the prescriptions given in the statutes, he has to undertake a new weighing of interests. And this is not primarily a purely intellectual operation. Like the work of the legislator which precedes it and which culminates in it, it is an *ethical* function.

From this point of view, the decisions of the courts have a special significance when the statute is silent and the judge has to take refuge in the rules of unwritten law. Obviously one cannot speak of finding the law in such a case, if the judge merely has to take the

rules out of the storehouse of the "system." In this case a certain juridical ability to scent the trail, guided where necessary by the feeling for right, is essential but the feeling for right is not the decisive element in the judgment. Once the judge is freed from this intellectualized law deduced by syllogistic methods from the statute, and once he sees the ethical significance of the law as a decision in a conflict of interests, he must, when the law is wholly or partly silent, take account of the unorganized sense of right within the social circle where the conflict of interest occurs and must render his judgment in accordance with the unwritten law so discovered. This does not mean that the judge undertakes the work of law-making; we have already discussed this erroneous view. [1]) The judges are fulfilling this task in increasing measure, though it may be secretly, because the prevailing convictions are still too seriously opposed to it. From all this it is quite clear that, at least in the field of private law, the domination of the law of the sovereign, with its baneful consequence of an intellectualized law, has given place to a view which regards the law as an ethical force and is resolved to put it into effect as such.

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[1]) *Supra*, pp. 134 f.

CHAPTER V

INTERESTS AND THE SENSE OF RIGHT

I. *Knowledge of Interests and Impartiality.* Whoever is engaged in law-making must satisfy two requirements.

In the first place, it is necessary to have a knowledge both of the interests to whose advantage a legal value is to be fixed and also of the interests at whose expense this value is to be set up. The legal value of an interest is revealed especially in the curtailing of the social force of some other interest with which it conflicts. Before progress can be made in fixing this curtailment, it is necessary that the content of both interests be investigated and that the needs of each be considered.

In the second place, it is deemed necessary for law-making that the sense of right which undertakes to evaluate interests should be placed in a position of impartiality. Whoever is engaged in law-making ought to experience no personal advantages or disadvantages from the limitation of freedom which results from setting up a legal rule. The sense of right which is to bring about a solution of a conflict of interests must be kept as pure as possible and must be kept free from anything which might be able to limit its full effectiveness.

Of these two requirements it is the latter which is chiefly kept in view; and accordingly we find numerous

attempts in political theory to realize what we might call the legislator without interests, while the other requirement, that the legislator ought to understand the pertinent social interests, is more or less neglected. We shall review in turn the more important of these attempts.

II. *The Platonic Ideal.* The oldest and at the same time the most celebrated theory of a legislator without interests is found in Plato's *Republic*, where this problem, though not formulated in so many words, is the point chiefly emphasized. Plato sought to secure the purest possible sense of right by means of the radical requirement of a communistic mode of life for the ruling class. The rulers might have no wives of their own, no children of their own, no property of their own, in order that they might remain free from all cares and interests. All factors which might disturb the exercise of a rational rulership were as far as possible to be excluded. Thus Plato accepts the same argument as that advanced for the celibacy of priests, viz., that those who devote themselves to the moral perfection of men must be free from all personal interests.

The Platonic ideal attempts to overcome the self-interest of the ruler by an external means, that is, through a destruction of interests. This idea is not without value for our own time. At present there are many who have a share in law-making who are ruled by self-interest and scarcely take account of other interests than their own; they seek to make legislation serve the purpose of improving their own economic

condition. Is it not reasonable that with a change in these external circumstances and with a partial disappearance of the economic factors which influence their sense of right, they will arrive at a more impartial valuation of rights? Indeed is not this already taking place? Plato's thought is thus given a different application. The ruler is to be brought to a mental condition suitable to law-making not by suppressing his needs but by satisfying them. With the disappearance of material cares, effort can be directed toward ideal ends, and this actually does happen in many cases.

III. *Monarchy*. In the same realm of ideas belongs the interpretation of monarchy as an institution which might furnish us with a sense of right free from the influence of the social interests to be evaluated. What is proposed in this connection is certainly not the re-establishment of absolute monarchy, but rather the retention or revival of the constitutional competence of the king to share equally with the representative body in law-making. Thus after the decision of the representative body, it would still be possible to appeal to a sense of right free from all the interests concerned. Such a sense of right is to be found in monarchy, because here a family is elevated above society and is given a preferred status with reference to honors and property; it therefore occupies a supersocial position which enables it to intervene in the conflict of social interests with the greatest possible impartiality.

On its face this argument is conclusive. It is a fact, however, that monarchies disappear and that where

they do continue, the veto power of the king loses its force under the parliamentary system. Even where the monarch's authority still possesses constitutional importance, as until recently in the German states, the opposition to such a sense of right, standing as it does altogether outside the people, is daily gaining strength. And all these facts make this solution of the conflict between interest and law to appear of doubtful value. The history of monarchy, in view of the record which it made when it was called upon in the eighteenth century to introduce reforms in the law, affords no assurance that this institution has grown equal to the task which it would have to perform. Now as then, the king, because he stands outside the life of society, is lacking in real knowledge of social interests. To be sure, it may seem that this knowledge could be given him by the representative body or by others, but even then he would have at best only a theoretical knowledge of these interests. He would not be able to experience directly the importance of interests, or to value them at their just worth, for too great a distance separates him from the needs and wants which are involved. In monarchy there is perhaps a legislator without interests; but for law-making, there is required, besides impartiality, also an insight into social interests, and this monarchy lacks. And this deficiency cannot be supplied without jeopardizing the impartiality which is monarchy's main claim to consideration. The course of events, therefore, has pushed this institution more and more into the background. And this process is hastened by the fact that, while the impartiality which

recommends it is a characteristic of the institution, it is by no means always a characteristic of the individual who bears the royal dignity. The sense of right which determines what the law shall be may be a blessing or a curse for the interests of the country and the people. That this sense of right should depend upon the accident of birth belongs to an order of ideas which is no longer defensible when a general effort is being made to exclude accident as a power regulating the apportionment of rights. When it is remembered, moreover, that an adjustment to the people's sense of right is needed to make the law effective as an ethical force, it is impossible to grant decisive authority to a sense of right whose agreement with the convictions of the people is throughout uncertain.

IV. *The Intellect.* It has been believed that the way to secure a legislator without interests is to give a free scope to the intellect. Considered from the standpoint of impartiality this solution appears very attractive. Thought and reflection, it may be believed, bring men to a condition of low sensitivity which closely approaches impartiality. Men of intellectual endowments are less emotional than others. Deliberateness in decision is particularly to be expected from a mind which is ruled by the understanding.

In order that the understanding may get the upper hand, it is necessary to institute a parliament in which the thinking part of the population, the intellect of the nation, is represented. And the suffrage must accordingly be so arranged that the elected parliament,

when it assembles, will be one in which reason and understanding bear the scepter. The results of this line of thought upon the representative system may best be seen in the writings of Guizot, who will serve as a type of the tendency under discussion.

According to Guizot, the citizens can be divided into three groups. The first consists of those who, as a result of their social position, enjoy sufficient leisure to be able to devote themselves to the general welfare. "Their leisure *permits* them to devote themselves almost exclusively to the cultivation of their intellect, to the study of general purposes, relations, and interests." Next to these, whom we may call the men of the study, stand the entrepreneurs, those engaged in directing industry. These *must* be well informed about current social changes on account of their business, and must therefore interest themselves also in political and social questions. They are "the men whom their business *obliges* to acquire knowledge and ideas which raise them uniformly to an understanding of general relations and interests." The third group finally includes the manual laborers. "Their work *prevents* them from going beyond the narrow circle of their individual interests, limited to the satisfaction of the needs of life." Of these three groups, Guizot thinks the first and second should be given the suffrage, but it should be withheld from the manual laborers, "limited," as they are, "to the satisfaction of the needs of life." The non-intellectual part of the population is thus sifted out of society and only the intellect is left. Moreover, the process of selection secures the advantage that the

interests of the working class are cared for by a representative body whose members are not under the influence of the selfish interests of that class, and therefore constitute a peculiarly impartial organ of legislation for these interests.

Until about the eighties, — in the era of liberalism, — this view was dominant in practical and theoretical politics. Its cardinal error is now sufficiently apparent. It seeks the cure for all social evils in the cultivation of the intellect, and disregards the fact that the intellect is a power which can be used for evil as well as for good. Thus, though the chief problem in law-making consists in overcoming the influence of selfish interests, there is no guarantee in a régime based on intellect that "the thinking part of the nation" will not apply its thought to the advantage of those interests which concern its own class. There is no guarantee that it will not express in legislation the selfish interests of this class to the neglect of the interests of that third group to which it is supposed to be opposed as an "impartial" power. Mill has clearly emphasized this fallacy of liberalism. He says: "Rulers and ruling classes are under a necessity of considering the interests and wishes of those who have the suffrage; but of those who are excluded, it is in their option whether they will do so or not; and however honestly disposed, they are in general too fully occupied with things which they *must* attend to, to have much room in their thoughts for anything which they can with impunity disregard." [1])

[1]) *On Representative Government*, Ch. VIII.

The liberal political movement never reached the idea that the primary qualification of those engaged in law-making is not intellect but character. It overlooked the *ethical* side of law-making and, like the entire legal profession of that period, from whom the representatives of the people were mostly chosen, it regarded law-making as mainly an intellectual operation. And if one looks over the parliamentary debates of that period, he will find on nearly every page the lawyers' tricks which are brought into the discussions. He will find almost no trace of the idea that the kernel of all legislation does not lie in a work to be technically executed, but in a weighing of interests by the application of an ethical standard. This bias is entirely comprehensible, since liberalism generally took no account of ethics and religion in the field of public life. And the low valuation of these powerful factors in the life of the individual fully explains the strong ecclesiastical reaction which we are still experiencing. But the error of liberalism appears most clearly in the demand for the *neutrality* of the state's authority, to which the intellectualist premises of this movement necessarily led. From the "impartial intellect" it deduced the "impartial state;" and it believed that impartiality was best secured when neutrality was accepted in every field, and especially in the field of law-making. Consequently it sought not to give every one his due, but to give to every one the same: the same education for every one, one school for the whole people; the same law for every one, an identical rule for poor and rich; the same freedom for every one, an equal independence in settling

the terms of legal relationships. But while this abolished all social distinctions, it took no account of the diversity of needs with reference to religious and ecclesiastical life; it closed its eyes to the actual inequality of individuals; it put in force a system of *laissez faire* by which unregulated social forces could dominate legislation; and everywhere so far as possible it accepted the competitive relationship. The neutrality of the state amounted in fact to giving a covert support to certain tendencies and social interests, and the word neutrality was in fact a misnomer.

There was indeed no lack of theories which opposed the solution of liberal politics. But a theory can be partly silenced, and is in fact partly silenced, so long as it has to find its support only in the logic of its principles. It is only when a theory strikes root in the human soul that its real influence begins to dawn. And then it begins to work with a force which can come only from an awakened conscience. So it happened in this case. The revolution in politics which we are experiencing at the present time has sprung not from intellect but from conscience. When the thinking part of the people, with its watchwords of neutrality and freedom, had abandoned the non-thinking part, "limited to the satisfaction of the needs of life," there followed a revolt which could not be suppressed with bullets and cavalry, because the souls of men had been aroused. In the whole field of spiritual life, in the field of literature, of religion, of morals, of art, as well as in that of law, we have seen, since the eighties of the last century, an outburst of feeling, a liberation from the arro-

gance of intellectualism. A new birth is being accomplished which has its origin in the newly awakened life of the soul. And thus politics also is released from the insipidity which permeated liberalism.

Neutrality as the essential principle of state action was never anything more than the flag under which the theory of the Manchester School invaded practical politics. But it is very closely connected with the view that the state is nothing more than a manifestation of power, or at any rate the view which seeks its essence in this, and which therefore conceives the state as having no connection whatever with any sort of purpose. On the other hand, as soon as the state is regarded as a spiritual authority manifesting itself in the law, it is no longer possible to maintain the neutrality of the state as a principle, because the state cannot be conceived as lacking a mission. The state cannot be neutral and ought not to be, and indeed in reality never has been. In a given case it may be a matter of dispute whether or not the state should intervene in human relationships, but the statesman who refuses to take a hand where great popular interests are at stake because of the presumed neutrality of the state would unquestionably be derelict in his duty toward the community, whether it were a case relating to the economic or the spiritual life of society. For in the law the community possesses a moral power which, because of its spiritual nature, includes end and purpose.

It is somewhat different to defend the neutrality of the state not as a matter of principle but upon tactical grounds. Forbearance on the part of the state can be

urged very forcibly, even where the existence of social ills or sins has been clearly established. The state in fact has no monopoly of remedial powers and it may frequently happen that far more lasting results can be achieved by waiting for the operation of other forces, without the intervention of legal authority. This is particularly true in the case of religious movements. A people which has been entangled in a barbarous orthodoxy or has gone astray in its moral conduct needs to be elevated. But in this case history teaches the lesson of non-intervention by the state, because the balance can be restored only in freedom and therefore where there is no interference by the law. But even here there are limits to the tactics of neutrality. And when these limits have been reached, the vocation of the state as a moral power involves the right to subject even the religious life to its rulership.

V. *The Balance of Interests.* Intellect has served its time as the determining factor in politics. The influence of the non-thinking part of the people upon the composition of the representative body has been secured. And yet the problem of legislation is more acute than ever, for the conflict of social interests becomes sharper and sharper in the representative body which is engaged in law-making. If this conflict cannot be avoided, it must be accepted as the starting-point. But from this starting-point, how is a legislator without interests to be obtained? Mill has given an answer to this question. In the first place, the representative system must be so arranged that a *balance* is established

in the representative body between the social interests. This equilibrium can be achieved by the use of plural voting, especially by a counterbalancing of those social classes which are most conspicuously in conflict, the capitalists and the workers. In a state whose population is not divided by race, language, or nationality, there are two chief classes: the working class together with those depending upon them, i.e., the group of small merchants and business men, and the employers in the widest sense, among whom also the capitalists belong. If these classes are equally represented, there will still not result a cessation of legislation, since among the representatives of every class will be found, according to Mill's prophecy, a small minority which is capable of subordinating the interest of their class to reason, justice, and the general welfare. Such persons, who react to higher motives than those of class interest, hold the balance of power in party votes. They unite with the opposing party in order to prevent class legislation, in which case the system has a negative effect. The positive effect is seen where the more elevated and independent members support a measure which benefits the other party; in this case the class interests of that party are recognized as legal interests.

Legislators without interests are, therefore, actually to be found in society. They appear automatically as a result of the representative system. Who they may be, one does not know in advance; this only comes to light when they have given their votes, perhaps in voting against measures which emanate from their own party, perhaps in supporting the measures of the other

party. It would follow from this that the élite of each party, when once selected in this manner, would be all that the representative system needs, and the others might as well return to their domestic hearths. But the others *must* remain, for the élite changes, — and here the system suffers shipwreck. The élite is composed at one time of certain representatives and at another time of others. But if all in turn belong to those who cast the deciding vote, then the mark of justice is upon them all and there is no real élite. Thus Mill's clever system proves delusive.

VI. *The Solution of the Conflict.* And the same is true of every other system which has yet been conceived, for a legislator without interests is a fiction which can only be realized at the cost of the second requirement which is as indispensable for law-making as impartiality, viz., an insight into and feeling for the interests with whose evaluation legislation is concerned. To be sure, the more completely the legislator is withdrawn from the sphere of influence of these interests, the more impartial he will be; but so much the less will he be in a position to judge rightly of their importance because of his lack of knowledge. And on the contrary, the nearer he stands to those interests, the better he will understand their nature and significance, but the less he will be able to maintain his impartiality. A thorough-going impartiality would result in a Stoical indifference to social interests; politics based solely upon interests and lacking a sober impartiality would issue in revolutionary passion. Therefore, we can neither

separate the two requirements nor attribute to one a greater weight than to the other. They must be united in equal measure in the same person. The same being who feels the living pulsation of interests must hold the scales. But if this is so, then it is self-evident that, so far as the two requirements are opposed to one another, the conflict must be overcome not outside, but *within* the individual himself. The representatives of the people primarily, but also the voters, must possess the power of raising themselves to a level of objectivity where the value of interests opposed to their own is clearly apparent. When, with the extension of democracy, class interests find themselves opposed to other class interests in parliament, everything must be directed toward filling the minds of our legislators, of electors and elected, not with the idea of the power which they are able to set in motion, but with the idea of the principles of right which it is their function to realize. By means of law we desire to secure the rulership of a spiritual power, not of an authority supporting itself upon compulsion. The watchword for democracy, therefore, lies in strengthening the moral capacity of the mass of the people.

It falls outside the limits of this treatise to mention all the ways and means which might contribute to this end, and which, as in the case of children's codes, are already being applied to increase the sensibility to the influence of law in the generation now living and growing to maturity. On the other hand, it is necessary to point out that in the organization of legislation attention has been altogether too much directed toward

the search for a legislator without interests, while much less importance has been attached to the need for a sufficient knowledge of interests. In order to satisfy this requirement also, a reconstruction of our constitutional law is needed which shall bring about a greater decentralization of law-making along quite different lines from those which are customary at the present time. Since, however, this decentralization appears necessary also from other points of view, this subject must be discussed in a special chapter.

CHAPTER VI

DECENTRALIZATION OF LAW-MAKING

The decentralization of law-making may be advocated from three points of view. Decentralization may be necessary in order to put law-making more into the hands of those who know the social conditions in which the law is to function. Again, it may be necessary in order to curb the increasing sense of power of existing organized interests (*Interessengemeinschaften*) by transforming them into legal communities (*Rechtsgemeinschaften*), i.e., associations whose internal relations are governed by law of their own making. Finally, decentralization may be needed because the people's sense of right may have inadequate organs and therefore its operation may be so impaired that the written law falls more and more into arrears.

I. *Decentralization based upon Community of Interest.* In so far as law-making has been decentralized in civilized countries, this has taken place on the basis of territory. Groups of population in specific territories have law-making organs and the authority of these organs extends over an indefinite number of interests. This is especially the case in the Netherlands, where there are law-making organs fo the groups of the population which are designated as the kingdom, the

provinces, and the communes. The entire production of law, so far as it is organized, emanates from these organs, to disregard for the present the dike associations. The result is that the legislature, the provincial assemblies, and communal councils have to provide for many interests which are so remote that they are incompetent adequately to fix their legal value. They know only a small part of the actual course of the social life, and yet they are required to pass judgment upon what lies beyond the range of their vision. Consequently they take refuge in abstractions and fill their minds with generalities like labor, capital, the Church, or with catchwords like Christian and Pagan, Jesus and Marx. As Gneist says [1]) "When these words correspond to a vital need of the times, they are called 'watchwords'; when they have served their purpose, they are called mere 'phrases'. The criticism of opponents is accustomed to anticipate this latter stage." So far as parliament is concerned, this divorce from the actual course of affairs is the chief reason why its effectiveness is so often dissipated in a mere knowledge of generalities which is all glitter and no substance. Most men are not developed mentally to a point where they can live by principles or understand their significance. Little differences, therefore, are magnified into the marks of diametrically opposed philosophies. This disease of imagining depths where there are scarcely shallows can be cured only by contact with practical affairs. Then it often becomes clear how slight the differences really are that keep men apart. In our direct contact

[1]) *Der Rechtsstaat*, Ed. 2, p. 241.

with social life we get a schooling of inestimable value, for here the absolute for which our souls hunger is found to consist solely in the fact that all social interests are of only relative value. The perception of this truth gives rise to a genuine impartiality, which cannot be won by holding aloof from interests but only by a clear consciousness of their real value. And this can be gained only by living in society. An insight into this need is gaining ground on all sides. Legal education has begun to put itself in line with this demand and to free itself from the mere literal study of the statutes. The judge is reminded again and again that his council-chamber is not enclosed within the four walls of the court-house but extends beyond it; the palace of justice must be moved to the market place of life. But while a training in sociology, psychology, and psychiatry is required for all judicial offices, the member of parliament proclaims himself merely the "supporter of principles." A teacher, a diplomat, a property-holder, and a professor are assigned to the task indifferently. The failure of the representative system as it now exists is due to the fact that more is ordinarily demanded of the sense of right than it can perform. A limitation in the range of interests for which parliament must legislate is, therefore, a matter of necessity.

In the communal councils the discrepancy between the work of law-making required of them and their knowledge of social conditions is equally obvious. It is rare that any one holds his seat in one of these councils as an expert. In fact an expert would be out of place there, for like parliament they have to legislate for an

indefinite multitude of interests. As a result, the members are elected because of their political alignment.

The decentralization of law-making, therefore, must follow the example of our national institution, the dike association (water corporation). Its first aim must be to call into being circles of interests and to make these autonomous. Organized law-making agencies will be freed from the duty of legislating for interests intrinsically foreign to them. These interests will be entrusted to the care of those persons who, because of their social connection with them, are best fitted to determine their legal value.

The practical application of this idea is found where the need is recognized of combining local communities into associations for special purposes (*Zweckverbände*). By this means new self-governing communities are created to care for specific public interests. The same notion is found also in the proposals for special associations on game, building, roads, fishing, and other similar corporations organized on the model of the dike associations. The same idea is seen in the effort to bring about an organization of trades under public law by forming self-governing corporations to protect and further the interests of business, industry, and agriculture. This idea has been realized in the creation of wage boards in which the parties essentially interested share in the work of legislation, i.e., in the fixing of wages. This has been done in Australia, and recently England has followed the Australian example. But when a timid effort was made in this direction here in Holland, in the form of a plan to establish bakery

boards and workingmen's councils with the authority to issue ordinances, the proposal was met with the protest that it entrusted law-making to the persons interested. It is obvious that this argument, applied in so wide a sense, strikes at the whole representative system. For it is impossible ever to escape from government by interested parties. All law-making and ordinance-issuing organs are certainly composed of interested persons. The most that can be accomplished is to prevent the sense of right from being confused by the interests. We get a much more certain guarantee against such confusion by entrusting legislation to those who live in the midst of social conflicts and who have the need for compromise clearly before them, than by trying to have the law handed down from the heights of neutrality.

II. *Transforming Organized Interests into Legal Communities.* Since the right to organize and combine has been generally recognized, unions of interested persons have arisen, especially in the economic world. These are organized virtually as war-making alliances. The purpose of these unions, especially of the so-called *syndicats*, is to develop a social power by which they seek to improve, so far as possible, the legal relations of their members. The resulting controversies often disturb the peace of society and sometimes endanger important public interests. This was not foreseen in granting the right to organize. It was not perceived that a theory which permitted legal relations to be established by conflict practically perpetuated a state

of war and thus in the last resort permitted the law to be determined by force. Now the view is gradually making headway that social life ought not to be controlled by the force which can be effectively exerted by unions, whether they be labor unions or *syndicats* of officials on the one hand, or employers' associations or administrative boards on the other. But it is a serious blunder to suppose that the power of these organizations can be suppressed by the mere will of the legislature. This destructive sense of power can be uprooted only by an internal change, by inspiring the consciousness of the interested parties with the ideal of right. In large part, however, this can be done only if the interested parties are themselves called upon to cooperate in making the law they live under, instead of receiving their law from above. In fact, the mere recognition of the right to combine stops half-way in the process of organization, because it stops short of transforming these combinations into legal communities, — that is, associations in which the contending social forces are brought together to make laws to regulate the interests which divide them. The lack of such associations gives a great impetus to the sense of power and does a corresponding injury to the sense of right. The legal relations which arise in the course of the struggle are merely truces which at any moment may give way to a state of war. Finally there comes a time, as in the strike of the English miners, when the warfare extends so far that it endangers great interests, perhaps even national interests, and then it becomes obvious that an association with its own legislative organs is a neces-

sity. And by the introduction of wage boards the idea was partly realized some years ago in England.

In this way, then, a decentralization of law-making may be urged as a means of curbing the gradually increasing idea that law can spring from force, and as a way of upholding the ethical character of the law.

III. *The Lack of Legislative Organs.* According to the modern idea of the state both political science and practical politics ought to devote the greatest care and attention to the organization of law-making. The detail with which text-books on constitutional law treat of the crown, as if the heart of the state lay in this institution, is in glaring contrast with the slight attention they devote to legislation. And yet, more and more, both within the boundaries of particular states and outside them, the legislature is obviously the real ruler. For the most part, however, this ruler's court has still to be created.

In the Netherlands we have three divisions of government which function in the service of the law, a national, a provincial, and a communal government. But this number is proving more and more unequal to the work required. This is true especially of Parliament, which each year falls more and more into arrears. Since society has a pressing need for a continual renewal of the law, it is forced to depend upon the action of the unorganized sense of right. This tides it over emergencies to some extent, but it is always a fragmentary way of making law. Unwritten law is at best an insufficient supplement to statutory law. As a result a

considerable part of social life is excluded from the control of law. Associations are made and dissolved daily without the co-operation of law. Thus relations not only become uncertain, but many relations are established which would certainly not be regarded as lawful if adequate legislation had existed but which now persist under the influence of uncontrolled forces.

These arrears of legislation can be made up in the long run only if the belief arises that our political organization needs to be developed by the addition of new legislative organs. The points of attachment for these new organs are the organized interests referred to in the two preceding sections. The domain of law is extended daily. Many interests are continually falling under the care of the community, or need such care, and the old type of legislative organ is powerless to meet this need. The barrenness of the legislature is not the fault of any particular system of government, least of all of so-called parliamentary government. Our parliaments do the best they can. Service in the representative assembly demands the whole time and attention of the member and in most cases this is actually given. The ministers labor at a problem which calls for a head of iron and the health of a professional athlete. And yet in spite of all this labor, law-making is in arrears.

But "it does move!" Society does not stand still. To be sure, it has got along for centuries and can get along some years longer in the same way. In the social life action does not wait upon law. Instincts, interests, and feelings of a higher or lower order keep the wheels mov-

ing. But for us the motion is less important than the direction in which motion takes place. And law determines the direction. When the law is in arrears the social whole and its parts are disorganized. Nevertheless, under the influence of natural forces and natural laws, results do come about but only as chance may direct, for there is no leadership. The question, then, is whether we dare remain at the mercy of such a condition; whether the social life must not be better directed to the attainment of valuable ends; whether a far greater proportion of the citizens must not be employed in effecting the development and rejuvenation of law. But if this is to come about, the agencies for this employment must not be lacking. In our times there is a great and a growing lack of such agencies, and in consequence the spiritual force of the law cannot achieve its full effect. Formerly it was possible to be content with a national, a provincial, and a communal parliament to afford legal protection to those interests which set in motion the sense of right of the generation then living. These interests were essentially limited to the maintenance of such public interests as peace, order, security, etc. After the seventies and eighties of the last century, however, the sense of right reacted to a far larger number of conflicting interests, including some which touched directly the personal life of the citizens. This has led to nothing, however, except the inclusion of a steadily increasing number of citizens in the work of law-making, but always by means of the already existing organs for this purpose. The inadequacy of this organization to produce the legislation needed by

society, as witnessed by the growing dissatisfaction with the existing legal system, now makes a forcible demand for the extension of the organization. This can be accomplished only by setting aside the old centralized method of law-making and by introducing new legislative organs. When these new organs are established to settle specific conflicts of interests by representation of the parties interested, the right to share in law-making will become a valuable privilege. At the present time the electors' right to express an opinion upon the legal value of interests has scarcely more than nominal worth. By such a change as that proposed the living sense of right in society will be brought into full operation.

CHAPTER VII

THE SOURCES OF LAW

In explaining the sources of law a distinction must be made between the sources of its validity and the sources of its content. Usually the phrase "sources of law" refers to its content, and in this sense statute, ordinance, custom, treaty, the science and practice of jurisprudence, etc., are named as the sources of law. In this field lies the service of the Historical School. It concerned itself chiefly with the question how the content of law is to be discovered, and in opposition to the School of Natural Law it showed that there is more than one source from which law can derive its content. If we were to take up the origin of law from this point of view, we might have to amplify the list of sources now that unwritten law (or more generally non-sovereign law) has been rediscovered in every field; we should also have to investigate the relative importance of each. Indeed the science of law has turned its attention to this problem. At the present time, however, this science is confronted primarily by another and far more difficult problem, since it has undertaken to investigate the *validity* of the law. Hence it raises the question: What is the common foundation of the binding force of all law, whatever its content may be? When the new legal science answers this question by referring

to the spiritual force of the sense of right which is active in men, and derives from it the binding force of all law, however made, it is well aware that it has done little more than point out a new field for investigation. Consequently this legal science must undertake especially the analysis of the sense of right, a task which has already been attempted in this country by Kranenburg. One thing at least has been accomplished in this direction, — the discovery that the validity of law arises from a *single* source and that this source must no longer be sought in abstractions like the state, the sovereign, the people, the legislature, parliament, or any other fictitious authority. It must rather be sought in a force of the highest reality, which never ceases to operate, never interrupts its work, or loses its obligatory character. This does away with the derivation of law and its binding force from a will, either a natural will or a fictitious one (as in the case of corporations, etc.). For the authority which gives rise to the legal character and binding force of rules lies outside the will and claims to dominate it. The sense or feeling for right has normative character, though the will has not. Because this fact is misunderstood by many scholars and the search for a normative will is continued, especially in the case of statutory law, the meaning of the new theory of law remains hidden from them. This is the case with Manigk [1]), the defender of the fame of Savigny. He still believes that the basis for the binding force of law must be sought in a fiction instead of in a reality which manifests itself in a more and more

[1]) *Savigny und der Modernismus im Recht*, 1914.

productive form. A knowledge of this reality forms at present the most important problem of the science of law. To this particular problem Savigny and his School contributed nothing. It is true that in the writings of Savigny and Puchta there occur expressions like "the spirit of the nation" and "national convictions," which have a bearing upon the validity of law. These are intended, however, merely to emphasize the instinctive or non-reflective growth of the law, as against the intellectualism of the School of Natural Law. In the field of law, Savigny occupied the same position in his time as the counter-revolutionists (Burke, von Gentz) in the field of political theory. The latter were the opponents of rationalism in politics and urged the traditional and historical as the proper guides for organizing the state. In his own field Savigny represented the reaction which appeared everywhere at the beginning of the nineteenth century against the rationalism of the period of Enlightenment and against the applications of this rationalism, especially in the French Revolution. This is the light in which the Historical School of Law must be understood. It is in no sense to be regarded as the precursor of what is now called the Free School of Law. It is possible, as Manigk has tried to show, that expressions occur in Savigny's works and that sentences can be selected from them which agree with the Free School, but details of this sort put Savigny out of the setting of his own period and give no material support to the modern school.

The problem with which legal science is now confronted is no longer the refutation of the theory of nat-

ural law. To this the Historical School made its own contribution, which led to the conclusion that "Positive law as it has developed historically carries the proof of its own justification." [1]) The problem at present is to overthrow another figment of the imagination, viz., the view which is content to base the validity of law upon abstractions and fictions by tracing this validity to a sovereign, a legislator, or whatever the subject of the state's will may be called. It must be insisted that the *legal* character and hence the *binding force* of rules is derived from a single authority, viz., that impersonal authority which asserts itself whenever our sense of right is aroused with reference to human actions. Once this point is emphasized we have entered upon the road which must lead to the giving up of the notion of a limited number of sources of law, together with the doctrine that statutory law alone is supreme. The result of this is *free law-making*.

There is only one sense in which it can perhaps be said that Savigny and his disciples were forerunners of the Free School. The rejection of the notion that reason is the only source of the content of law necessitated a multitude of sources of law. But one will look in vain in Savigny for the proposition that this multiplicity, — or indefiniteness, as we should now say, — results necessarily from the basis of legal authority, for Savigny does not recognize the validity of positive law as a problem. The validity of law only very recently became a problem. Its solution will necessarily bring with it a

[1]) Karl Wieland, *Die historische und die kritische Methode in der Rechtswissenschaft*, 1910.

revision of the list of sources from which law derives its content. We are concerned here, however, chiefly with the investigation of the validity of law. In this connection there is only one decisive factor, as we have tried to show, — the feeling or sense of right.

CHAPTER VIII

THE DEVELOPMENT OF LAW

The acceptance of the view that the basis of authority lies in the sense of right has an importance for the development of law that can be understood only by contrasting this view with two others which for a long time checked and obstructed the growth of law and which to some extent continue to do so even yet. One of these views is marked by the high value which is set upon the *historical process*; the other emphasizes the share which *intellect* has in the development of law. The former regards the development of law as mainly an *instinctive* process which goes on outside consciousness; the latter regards the making of law as primarily an *intellectual* operation.

The theory of the sense of right is opposed to both these views, since it seeks to understand the development of law as arising primarily from men's emotional life. A product of history or of the understanding which cannot stand the test of the existing sense of right has lost its validity. Consequently it is an *ethical* factor which controls the development of law.

In order to explain this we must examine more closely the meaning of "historical process" and the rôle which mere intelligence has played in the development of law.

I. *The Historical Process.* The phrase "historical process" carries with it the notion that what has come about in this way has a value of its own and thus has a right to exist in the future. When a specific occurrence is called "historical," this is a judgment of value, though the occurrence is a mere matter of fact. The value of the "historical" is expressly asserted by those who believe that they can see in facts a revelation of the will of God. The historical process obtains in this way the appearance of divinity. Hence we find the most frequent references to the historical process in those schools which start from revelation and which believe that they can find revelation not only in the *word* of God but also in *history*. As Groen van Prinsterer, a Christian statesman, puts it, we have to reckon not only with "thus it is written," but also with "thus it has come to pass."

In this way, for example, De Savornin Lohman in this country has justified our monarchy.[1]) The sovereignty of the House of Orange is the outcome of facts, and because of these facts it has manifestly been called to the throne by God.

How far the tendency may go to regard facts as divine revelations is best seen in "Our Program" by Dr. Kuyper. Here we learn that "the Almighty bestows sovereign political authority sometimes by prescription after conquest by force, sometimes by agreement and contract. Sometimes also it is bestowed through a regular mandate either by the unanimous assent of the

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[1]) *Onze Constitutie*, Ed. 2, 1907.

people or in solemn convocation of their leaders. And finally, so far as the individual occupant of the throne is concerned, it is most frequently bestowed through inheritance. None of these ways lies outside the divine ordinance." It is obvious that from this point of view earthquakes and floods might just as well have been included in the list.

It often happens, however, that without expressly regarding the historical process as a revelation from God, the *status quo* is defended by conceiving it as historically evolved, in accordance with the principle of the Hegelian philosophy of law that, "The real is the rational." More than one application of this principle might be pointed out in quite recent times. Thus the requirement of more than a bare majority to amend the constitution has been justified by the argument that "in this case history is on the side of the minority." The former minister Loeff thus expressed himself, believing that he could by this means obtain a special sanction for a human device. We find the same line of thought also in Professor Struycken when he says that what has evolved historically has a high legal value for us.

I borrow a final example from the report of the Commission of 1910 on the Reform of the Constitution. Here the facts are frequently regarded as setting a standard. In regard to private education (that is, education not entrusted to a public corporation) the remark is made, "Private education ought to be recognized as having the place due it on the basis of the *facts*." To justify continuing the financial relations between church and

state, we are referred to the obligation formerly assumed by the state, an *obligation* which in turn originated in prior *facts and events*.

The thought which lies behind the appeal to the historical process originated in the attack upon rationalism, especially as the latter manifested itself in the French Revolution. This attack is to be found in the writings of Burke, von Gentz, and de Maistre, all of whom sound the same note. They set up in opposition to rationalism a development proceeding without reflection, an instinctive growth as opposed to the product of consciousness. Their emphasis falls upon tradition and on this basis they espouse the principle of legitimacy. As we remarked in the preceding chapter, the same idea is to be found in Savigny and his School, for they reduce conscious law-making by legislative enactment to second place and give precedence to customary law which grows up without reflection. Stahl has given the clearest statement of the significance thus attributed to the historical process. [1]) The legitimist party, he says, takes its stand on the foundation of historic right. But what is meant by historic right? It is not a law of nature or reason, such as the Revolution appealed to, which is nothing more than a bundle of human opinions as to what is right. Neither is it positive law or statute, that is, what the authority of the state has promulgated, though this has formal validity. The latter ought to be changed in many respects, since it has originated from the arbitrary act of

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[1]) *Die gegenwärtigen Parteien in Staat und Kirche*, Lect. 23.

the sovereign people without reference to the positive law which has been handed down to us from the past. Rather, the legitimist party understands by law the traditional legal order, the law which has originated naturally and evolved historically (*the law which has been handed down, the law which has come about naturally and historically*). This law, which originates in custom and various kinds of statutes, is not rooted in human reflection and in general has not been introduced by men, but is a product of nature and history. It is this law which is opposed to the Revolution; it is not based upon arbitrary human choice but rather upon the human tendency to respect the existent, the evolved, the traditional. Consequently it is put forward as something which is given to man and not made by him. Stahl does not hesitate to draw the conclusion that claims and privileges which have been once granted to individuals and classes by earlier law must be recognized as incontestable vested rights.

In so far as this view issues in the notion that the decrees of God are revealed in history, as was the case with Stahl and his followers, it demands a degree of faith which it can no longer command, in the face of the scientific point of view. But in so far as this is not the case, and the point of view of revelation is not adopted, the historical process is nothing more than the formula of a reaction against rationalism. In order to escape from the results of rationalism and of the principle which lies at its basis, an appeal is made to the forces of the *unconscious* life, from which the present or the former political and legal systems in large measure

originated. To have pointed out these forces is undoubtedly the great service of the Historical School in the field of politics and law. Thus it contributed to establish the view that no legislative fiat can dissolve the tenacious bonds of the social life. Certainly it has opened our eyes to the truth that, without a fundamental knowledge of these bonds and without an insight into actual relations, the commands of any authority however lofty are mere impotent and ineffectual precepts, if they do not take account of social forces outside the law. But it is one thing to take account of these forces and another to regard their operation as processes having a peculiar spiritual value. If we attribute unique and independent value to the historical process and rule out the purposeful intervention of men, we are compelled to give free play to various social forces and to regard their operations as inevitable. It is this disposition to put aside human responsibility which must be guarded against.

The essence of the theory in question lies in its failure to appreciate the value of the *spiritual freedom* of men. It immures the spirit in a past which for the most part was not the product of spiritual forces but was imposed upon us from without. On the other hand, the rise and success of rationalism came precisely from a significant effort to win back this spiritual freedom. Against a repressive history it set up a source of values which sought to create an order out of spiritual freedom, in spite of the historical development of the state and of law. In a highly one-sided way, though as we shall see hereafter in a way which is perfectly intelligi-

ble in the light of the circumstances under which it flourished, rationalism supposed it to be possible to find the chief source of these values in the intellect. It over-estimated what this part of the mind can contribute to the development of law. But this in no wise diminishes the universal significance of rationalism and of the School of Natural Law to which it gave rise. For the latter opened a period in which the human mind broke through the bonds of a system of thought which oppressed and utterly misconceived the freedom of the spirit.

This has happened more than once, for history shows us a succession of periods in various fields when such a regeneration has occurred. Some of these periods may be mentioned to make clear our criticism.

The first and perhaps the most important of them all we find in Greece at the time of Socrates, when the world presented itself to the human mind as a mirroring of its own spiritual life. Thus Socrates found in the formula, "Know thyself," the key to an understanding of the universe. The history of the cosmic process is measured by what we experience and suffer from it.

The rise of Christianity brings us to another period centuries later. Once more humanity divests itself of a portion of its history by bringing the life of the individual into immediate relation with the Absolute. The spiritual life expands, for by casting off past and present it is transported into eternity. Humanity sets itself to preparing for this eternal life, for the other world. To this end it establishes a new community, the Church.

The third period to which we refer arose from the clash of ancient Greek thought with the supersensuous truths of the Church. The Renaissance satisfies the needs of the understanding; the Reformation satisfies those of the spirit. In both it came to pass again that men shook off the incubus of a history imposed upon them from without. The Renaissance frees men from a system of thought which had deduced all events from the ordinances of God, and brings the individual to a consciousness of the value of his own spiritual life. The Reformation carries out the same idea in the sphere of religion and no longer tolerates the Church as an intermediary between man and God.

A fourth period finally is that of the French Revolution. It attacks social and political relations, as these had developed in the course of history, and places before the nations the task of ordering these relations according to ends which they set for themselves.

In each of these periods a spiritual liberation is accomplished, the motive force for which wells up from men's inner life. It is a liberation from something imposed from without by alien forces, from an inherited but spiritually outworn past. To accomplish this liberation and so to bring about the recognition of new values, space must be cleared in our consciousness. The heavy burden of thoughts, feelings, and instincts with which our train of life is loaded is a powerful check against progress to a higher stage of civilization. But just as the life of the individual has moments of spiritual liberation, so humanity also, in its struggle toward a higher life, has its periods of reform in which it strives

to free the spirit from the yoke of history and to cast off the burden of the merely historical. It may be that once more we are standing upon the threshold of such a period. In any case it is certain that the appeal to the merely historical betrays a misconception of our spiritual faculties and aims at preserving the existence of a mode of life even though it has lost its spiritual significance. The only test by which a decision can be made is the consciousness of the living generation. Thus in the field of law also the historical can claim present validity only in case its rules commend themselves as rules of law to the sense of right at present dominant.

II. *Intellectualism.* We must now turn our attention to the second of the two views mentioned above and consider the importance which the *intellect* has had in the development of law.

As we said before, rationalism is a theory directed toward the theoretical and practical liberation of the mind. When, however, it based the development of law primarily upon the intellect, it far overshot its mark.

In order to show this, we shall begin with the objection which is usually made against the French Revolution, namely that it was not only unhistorical, — this can be said of all revolutions that give a new direction to the human mind, — but was indeed intoxicated with the spirit of rationalism. This is not to be denied. In reconstructing the government and in settling the laws which were to be enacted by the state, rationalism

was almost the only method used. England was practically the only source of empirical data upon the organization and operation of popular government, but owing to the swift march of events, the leaders of the Revolution scarcely had time and opportunity to profit by what Montesquieu had imparted to his countrymen regarding the English Constitution. Of Montesquieu's teaching, only the separation of powers, which he had especially emphasized in English constitutional law, was available. Everything else had to be constructed on the basis of general ideas which were deduced from the nature of man, in so far as the thought of the time was not dominated by Rousseau. The naive remark of a member of the Convention indicates the spirit in which France was provided with a new constitution. Feeling called upon to instruct his fellow legislators regarding "the course which we should follow in the organization of society," he continued, "In dealing with these weighty questions I have sought the truth in the natural order of things and nowhere else. I have wished, if I may so express myself, to preserve the virginity of my thought." [1]) Reason and understanding, with an idealized state of nature as a background, were the only sources of knowledge which were consulted at the birth of constitutional law.

With the French Revolution, there begins the exaggeration of the rôle which reason and understanding play in the course of events. The practical realization of what had been only a dream to the rationalists of the eighteenth century has since filled the human mind

) *Réimpression de l'ancien Moniteur*, Vol. XIII, p. 378.

with the value of the intellectual faculty to such an extent that until recently it was regarded as the only test of all wisdom. Is it surprising, then, that Comte, [1]) when he wrote his famous lecture on "Social Dynamics," should have made social depend upon intellectual development and thus have arrived at the conclusion that it is "*intellectual* evolution which determines essentially the main course of social phenomena?" Hence science holds the highest place. According to Quételet, [2]) science is the only spiritual possession which really advances; according to Buckle, [3]) it is the only essential factor in progress, since the moral endowment of man remains stationary.

Thus the extent to which science has influenced social life is very highly estimated. Reference is made to the discovery of the lightning rod by Franklin, the steam engine by Watts, to the free-trade doctrine of Adam Smith, to the influence of Rousseau on practical politics, to the Kantian doctrine of the incapacity of human reason to prove the existence of God. All this, as Loria says, [4]) served to support the view that the *intellectual* faculties occupy the first place in human development. Until far into the nineteenth century the cultivation of these faculties occupied a prominent place in practical politics. In 1867 a public commission in this country, summing up in its official report the results of a four years' investigation of the condition

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[1]) *Cours de philosophie positive*, Lecture 51; cf. Lecture 46.
[2]) *Physique sociale*, 1867, Vol. II, p. 396.
[3]) *History of Civilization in England*, Vol. I, Ch. IV, 1872, pp. 180 ff.
[4]) *La Sociologia*, 1900.

of child labor in factories, formulated its conclusions as follows: "We cannot advise either the establishment of a minimum age for children working in factories or the regulation of hours of labor. The *only* means from which we expect good results is to oblige all parents to send their children to *school* regularly during a number of years beginning with a certain age."

This intellectualist tendency had a strong influence upon the science of law and politics as well as upon their practice. Hence there arose an endless stream of dogmas, doctrines, concepts, and logical devices which controlled politics, legislation, the administration of justice, and unfortunately science itself; in fact, this amounted to a dictatorship of the intellect. For where dogmas and doctrines control our thought, they set up a formidable obstacle against the entrance of facts into our minds. Reality must break its way in before doctrine loses its control over the mind. All sciences have had this experience and still have it. In particular, however, the mental and moral sciences (*Geisteswissenschaften*), especially theology, enchain the mind with their dogmas, because these sciences contain an emotional element which makes it painful to abandon preconceived ideas.

How great a rôle has been played in political science, for example, by the doctrine of the *trias politica*; by the "concept" of the constitution, "that which supports everything else," as Thorbecke has said; by the "nature" of constitutional monarchy; by the concept of "fundamental rights;" by the idea of "representation;" by the "principle" of the separation of church

and state; by the concept of "freedom" and the doctrine of "sovereignty."

A list of the practical measures that have been retarded or strangled at birth merely because these fictions have been put forward as scientific realities would be only too wearisome. It is enough to say that all these formulas represented accurately enough a phase of history but contain not a single stimulating idea for the present. Nevertheless, they drag along from generation to generation and render present-day reality unintelligible by overlaying it with a crust of obsolete science.

The case is not different in the field of law but rather worse. In this field an even more rigid strait-jacket has been fitted to thought. The labor of centuries has been expended in fashioning it and it is nearly impossible to free oneself from it. A man can in no case be a judge unless he has learned to see social life in the form of logical fictions which jurists have built up in the course of time and which have frequently become embedded in the statutes also. Is it necessary to append here a list of these concepts? Is it necessary to recall the notorious "legal personality," the frightful doctrine of "possession," the construction of the tortious act? Everything is involved in concepts and systems and these, with deductions from them, dominate legal relations. And for the most part all this can claim no further meaning than that of a form in which our social life now fits only in the slightest degree, since the social life has changed while the form was being made.

When we have canvassed this situation, we realize for the first time how difficult it was for reality to affect men's minds, since reality could be seen for the most part only through the prism of *a priori* concepts and historical tenets. Much space must be cleared in the thicket of our dogmatism before we can get a glimpse of reality as it is. Direct contact with reality has been lost because of all these concepts, principles, systems, and postulates. So long as we do not lay aside the dogmatic mirror in which we collect our perceptions, our minds are held fast by constructions from the history of earlier generations. We need to be enrolled in a new school, a school which shall make us capable of seeing and understanding things with our own senses and not with a mind permeated with historical dogmas. Our inner life has, as it were, been broken up into fixed patterns and thus its spontaneity has been lost. But the change is no longer far off and the new guide can already be discerned.

III. *The Emotional Life.* As soon as men tried to put into practice the intellectualist ideas and concepts which were spun especially in the eighteenth century, the one-sidedness of rationalism made itself evident and a reaction against its domination began. This reaction, however, overshot its mark. It not only believed that a test of the first fruits of rationalism showed that this view of life must be rejected outright, but it took refuge in a diametrically opposite view of life which referred all progress to the forces of the unconscious. It even made bold to interpret facts as

the symbols of an immanent will whose direction no one could determine and to which one might therefore attribute any content he liked. This tyranny of facts, as the event shows, was taken advantage of to glorify the existing order. Consequently, if one wishes to judge rationalism rightly, he needs an entirely different foundation from that offered by the merely historical. At the beginning of this chapter we stated the matter clearly when we said that we are on the point of changing leaders and that the guidance of life is passing from the intellect to the *feelings*. This means that the intellect must lose its primacy also in the development of law. We are about to close the period of our history in which the leading rôle was played by a rationalism which saw in the intellect the only source for the knowledge of reality, which opposed dogmas and doctrines to reality, and which confined the latter in a rigid form of thought where logic alone was decisive. We are on the point of discarding everything in the field of law that is included under the ill-famed phrase, "a jurisprudence of concepts." In its place we shall recognize the precepts of the emotional life as a new source of our knowledge of duty. We are perfectly aware of the misunderstanding to which this statement may give rise. If one is to draw hasty conclusions, he can scarcely find a more accomodating material than by ringing the changes on the opposition between understanding and feeling. Sages never cease reminding us how circumspect and sceptical a person need be if he is to guide his conduct amid the solicitations of feeling. In particular, when one penetrates into the psychology

of the masses, one meets an emotional life so uncontrolled that this source of conduct is attended by the greatest dangers. This merely proves, however, that, just as the intellect must be prevented from descending to dialectic, so limits must be set to the dominion of feeling, if it is not to degenerate into a diffuse sort of life controlled by momentary impulses.

Nevertheless, we cannot on that account abandon the proposition that the operation of the emotional life is the most powerful factor in progress and that our time grows more and more conscious of this fact. It is a fact of universal experience that the understanding manifests itself as a way of explaining events and of guiding us in the endless multiplicity of concrete things. On the other hand, an obligation to act or to refrain from acting arises not from the intellect but from the emotions. Indeed the whole world of norms has its basis in this part of our personality and thence arises that sense of values which is the guide of life. On the other hand, this sense of values can teach us nothing about the relations of cause and effect. In this matter the decision rests solely with the intellect, even though it frequently happens that the decision is, *non liquet.*

But there is no need to go deeper into this difference of functions here. Since the eighth decade of the last century practice has made clear to every one that the emotional life, which up to that time had been repressed, is putting itself forward and claiming the leadership. Thus it not only brought to an end the period of rationalism but also burst the bonds of the merely

historical. Buried as it was under the deposit which history and tradition had left in our minds, forced down by the accumulation of highly rationalized systems and doctrines, the emotional life had difficulty in gaining utterance. Men still relied on facts and dogmas, which weakened the sense of responsibility and increased the want of normative values. This insight is now aroused. It penetrates more and more both public and private life. It has set in motion the process of purification which we now perceive in the fields of law and politics.

For is it not owing to this insight that men have been made conscious of new fields of governmental activity to which the sovereign had remained entirely indifferent and which the understanding had shown itself unable to discover? In particular, is not the origin of all "social legislation" to be sought in the emotional life, and has not the passage of this legislation meant the rejection of a large part of the intellectualist creed of the preceding generation? The case is the same with the rise of the School of Free Law, which seeks to satisfy the living impulse toward justice in us by opposing a merely intellectual method of legal development. Has not the freer mental life advanced the social position of women by leaps and bounds, in spite of historical fact? Nor should we forget how in the state subordination to a personal authority has begun to give place to the rulership of law, thus completing the establishment of an inward authority. At all points the struggle with the merely historical and the purely rational has spread from this center. The concept of

"punishment" is falling into the background, for even though the old names are retained, the special administration of criminal justice for children, measures for the reform of the delinquent, and legislation in behalf of the mentally defective have either made their entry or are approaching, under the impulse of a feeling of justice which rejects all dogmatic and rationalist considerations. Note also how differently the duty of the sovereign toward poverty is now conceived as compared with earlier times. It would be impossible now for a cabinet minister to say publicly and without meeting contradiction, — as one did in this country in 1870, — that state interference is justified "only in case of the most extreme need *in order to prevent loss of life.*" Or to recall the still stronger statement of a minister somewhat earlier, "The needy should never receive charity from a civic poor board, but *after they have endured much suffering and only in cases of the most extreme need,* they may obtain what is indispensable from the police authorities." That all this can no longer be said, much less done, is a result of the newly awakened emotional life, which reacts in a quite different way and far more powerfully than the intellectual faculties were ever capable of doing. It is not merely as a result of intellectual considerations that woman suffrage has become the order of the day. The influence of feminine sentiment upon the consideration of public affairs is admitted everywhere to be a necessary supplement to the more purely intellectual masculine mind. Even in the administration of justice and in our highest court, decisions are based upon the emotional

life and the "feeling of right" is acknowledged as a source of rules.

It is evident from these facts that a new basis of law has become an essential element of our present-day civilization. The source of the duty to obey is found in an ultimate phase of consciousness which manifests itself as the feeling or sense of right, just as in an earlier period, which was controlled by rationalism, the law was derived by a purely intellectual process. This new basis of law arises from a need for a life conducted according to normative values. Many social sciences, such as psychology, ethics, jurisprudence, religion, and metaphysics, are gaining a new vigor through the effort which each is making in its own field to discover in the motive force and the content of the emotional life the means for satisfying this need, and to make clear the norms which such a need aims at. Thus at last men dare to admit that the emotional life furnishes a motive for valuable actions to which the understanding could not have moved us. In a former and prevailingly rationalist period this view would have been greeted only with a shrug. Submission to the actual, which resulted necessarily from the appeal to the merely historical, has likewise come to an end. The view is spreading more and more that standards of value and therefore the sources of our conduct lie in ourselves and not in things or in their historical development. By this means a long neglected field of investigation is opened to jurisprudence. Its immediate task is now to further the development of law by establishing the content and mode of operation of the feeling for right.

To this end it must keep itself in the closest contact with real life and its history. By accomplishing this task it will give a higher validity to the modern idea of the state, which bases the state upon the foundation of law and recognizes the authority of law as exclusively sovereign. Thus the rulership of the state has gained a more real and a more enduring basis than the most complete power can ever afford it.

CHAPTER IX

THE STATE

I. *The Old Theory of the State.* As Jellinek correctly observes, [1]) the word "state" is scientifically very useful because it connotes nothing and therefore serves as a protection against ambiguity when it is applied to specific phenomena. But to what phenomena is it applied? Here too it seems as if we had to be content with words. The Netherlands, England, Belgium, Prussia, and France are all designated as states. If we consider both the scientific and the practical meaning of this designation, we can say that universally it means an organization including a portion of mankind which occupies a definite territory. The countries mentioned above differ from one another in the details and peculiarities of their organization.

But what organization is meant in this case? According to traditional political theory, the typical feature of the organization which makes a portion of mankind into a state lies in a relation between persons who command and persons who obey. Among such a portion of mankind, there emerge certain persons who issue commands; in contrast with these, all others are in a condition of obedience. Those who command are the rulers; collectively they make up the sovereign. Those

[1]) *Allgemeine Staatslehre*, Ed. 2, p. 129.

who obey are the subjects and are collectively described as the people. "Men who command and those who obey their commands make up the substance of the state." [1]) Political theory, however, or at any rate German political theory, is not content with this fact, but institutes a search for the *right* to command and the *duty* to obey. This reciprocal right and duty is deduced from the natural relation between a community and its members. In the case of the state we have to do with such a relation. Since certain persons are deemed to be organs of the community, they are naturally invested with the superior value of the community. Consequently they possess a *natural* right to command and accordingly the members of the community are subject to a *natural* duty to obey.

Duguit's political theory also, in explaining the organization typical of the state, starts from the fact that there are those who rule and those who are ruled. But for him the fact is enough; there is no right to command. "The truth is that political power is a fact which in itself has no quality either of legitimacy or of illegitimacy." [2]) "No one has the right to command others; neither an emperor, nor a king, nor a parliament, nor a popular majority is able to impose its will as such." [3]) How such a fact came to be is an historical question. In general, the distinction between "rulers" and "ruled" is a result of the fact that in all social groups the stronger rule; "the stronger impose their will upon the

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[1]) Jellinek, *Ibid.*, p. 169.
[2]) *Traité de droit constitutionnel*, 1911, Vol. I, p. 37.
[3]) *Ibid.*, pp. 41, 88.

weaker." But in what does this strength consist? "This greater power," says Duguit, "presents itself under very different guises: sometimes it has been a purely material force, sometimes a moral and religious force, sometimes an intellectual force, sometimes (and very often) an economic force.... Thus in all countries and in all times those who are materially, religiously, economically, morally, intellectually, or numerically stronger have sought to impose their will upon others and have in fact done so." [1]) Even in the case of Duguit, however, this fact is not the last word which he has to say in describing the organization typical of the state. For the rulers are subject to the commands of the law. The "public authority" not only has the task of carrying out the law but is also obliged by law to do this. "The state is founded upon force but this force is lawful when it is exercised according to law." [2]) This carrying out of law, — to which the law itself supplies the obligation, — shows itself in three directions, in the legislative, judicial, and executive functions. The real authority which creates standards of conduct is, therefore, the law, but this law itself is natural law, just as in the case of the German school; it is a modernized form of Hugo Grotius's law of nature. The theory starts from the fact that man lives in a community and must do so. A community is inconceivable without solidarity or "social interdependence." Grotius would have called it the "social force" (*vis socialis*). This solidarity, "by virtue of its very nature," prescribes rules

[1]) *Ibid.*, pp. 37 f.
[2]) *Ibid.*, pp. 41, 88.

of conduct to man, viz., to do nothing which would injure solidarity and to do everything which may strengthen and develop it. "The whole objective law is summed up in this formula, and the positive law, if it is to be valid, ought to be the expression, the development, or the application of this principle." [1]) The law to which each and every person, including even the rulers, is subject has therefore its own independent basis. And Duguit rates the binding force of this natural law so high that the positive law is valid only "if it is the expression of this objective law." For, as the author says, "the law derives its binding force not from the will of the rulers but from its conformity to social solidarity." [2]) In this way, therefore, it becomes possible to assume what the German school had tried in vain to prove, viz., that the state is bound by positive law. According to German political theory, positive law gets its binding force from the authority of the state, and therefore as a matter of principle can never control the state itself. For Duguit, the positive law (*Gesetz*) is binding because, — and in so far as, — it expresses law in general (*Recht*), and the latter is valid independently of the state; that is, the term state signifies "not that so-called collective and sovereign person, which is a fiction, but the real persons who actually hold power." [3])

These conceptions of the type of organization denoted by the word "state" form the two most important

[1]) *Ibid.*, p. 17.
[2]) *Ibid.*, p. 53.
[3]) *Ibid.*, p. 49.

points of view regarding it. We have omitted the political theory which considers the power of the sovereign as a divine right and which accordingly supports the natural right to sovereignty by the law of God. We have dealt with this theory elsewhere. [1]) Since this view is an article of faith rather than a representation of reality, it is not susceptible of scientific investigation. It is unnecessary also to say more about other views, such as that of popular sovereignty, or its more recent restatement under the name of "national sovereignty," which is as far removed from reality as the "social will" or the "general will." [2]) These conceptions do not explain the facts but rather seek to adapt them to a preconceived, abstract theory.

II. *Criticism.* As regards the two conceptions of the state under consideration, it is scarcely necessary, in view of what was said in the preceding chapters about the basis of authority, to discuss their insufficiency beyond showing that they are at variance with the facts. Both maintain the actual existence of an order marked by the relation of ruler and ruled, but both lose sight of one principal point, viz., that the rulers, according to the view now accepted in all civilized states, derive their rulership from the positive law. This view, in the frequently quoted words of Laband about the subordination of the state to law, is accepted as a settled element of our civilization. The rights of

[1]) *Die Lehre der Rechtssouveränität*, 1906.

[2]) Esmein, *Éléments de droit constitutionnel*, Barthélemy ed., 1914, pp. 280 ff.

electors, the powers of members of parliament, the authority of the judiciary, the powers of the police and the army are all determined by law and can be determined in no other way. Hence there is in reality no authority which does not have to justify itself as lawful. Neither Duguit nor the German school is aware, or at any rate sufficiently aware, that the theory of the legal state has changed from a theory to an actual fact. They do not realize that the present generation accepts as a fundamental truth the proposition that except through the law no one can rule, even though he be invested with the crown, the toga, or the general's baton. This truth which is continually forced upon us in practical affairs is precisely the distinction in principle between the modern idea of the state and the notion of a natural relation between the rulers and the ruled, the sovereign and the people. The latter notion did indeed occupy men's minds up to the rise of the constitutional system, that is, until legislation began again to take its rise from the popular sense of right. Thus the German school is always preoccupied with an idea of the state which is typical of the *ancien régime*. In accordance with the actual facts of that day, the person of the ruler was conceived to be the bearer of an independent authority and a special basis for this authority had to be sought. The German school has merely abandoned the foundations of this authority which were recognized by the *ancien régime*. The will of God or the will of the people, together with the various forms of the contract theory, has disappeared. In their place a juristic personality has been brought

forward, called indifferently the state or the community, which is alleged to be the possessor of all the authority formerly wielded as personal power. It is further alleged that the actual rulers derive their legal competence from their relation to this personality. This proposition has the same characteristics as the fictions of political theory in the *ancien régime*; it is dialectic biased by propaganda. There is, however, this important difference: The *ancien régime* was seeking a basis for something real, while at present the theory is trying to make a basis for something that has ceased to be real. At the present time political life knows nothing of self-justifying sovereigns. Any one who is to rule, even though he have an historical title from the past, must derive his authority from the law. Hence it has become a waste of effort to seek the basis of an authority that has ceased to exist as independent.

Duguit's political theory leads to a similar result. In asserting that the state is "simply a fact," this scholar also loses sight of the fact that the position of the ruler has a legal ground and hence arises from the rules of positive law. At an earlier date this might have been doubted, because the connection between the sovereign and the legal system which controlled the people was not easy to show. Consequently it was necessary then either to recognize the state's exercise of power as a "simple fact," as was done by Spinoza, or to justify it in some special way, as was done by most of the political philosophers. Duguit adopts precisely Spinoza's point of view, which was also that of von Haller at a later time. A merely factual relation of power,

— that of the stronger to the weaker, — is represented as a product of nature. This view is made no more acceptable to us by reference to the various social forces, — economic, religious, moral, material, intellectual, — which from time to time take the leading place in society. For even though the influence of these forces be admitted without reserve, this in no way invalidates the other fact, which is decisive in this case, that the rulers owe their position exclusively to the positive law. It may be admitted that the positive law does not yet correspond to our ideal of it and that the sense of right which gave rise to it was defective; it may be admitted that the persons entrusted with law-making are not sufficiently impartial in their attitude toward social interests of a material, moral, religious, and intellectual kind. Still this does not alter the fact that the title of the rulers is a *legal* title founded upon positive law. This is the point which deserves all the emphasis. If this be borne in mind there is no need to have recourse to a legal system embodying the law of nature and arising from "solidarity" to keep a check upon the actual rulers and prescribe how they shall use their actual power. It cannot even be shown as yet that the law can be deduced from solidarity, for solidarity is an abstraction and cannot be recognized as an active principle unless it can be shown that the sense of right is inspired throughout by it. This would require an analysis of the sense of right, something which has only just been undertaken in this country by Professor Kranenburg.[1]) But even if the deduction were

[1]) *Positiefrecht en rechtsbewustzijn*, 1912.

correct, this law of nature would be confronted by the "simple fact" that rulership devolves upon certain persons without the co-operation of law either natural or positive, just as will is a natural faculty of the individual. If then the ruler's title cannot be questioned on the basis of law, because it is not a legal title, the law is confronted by a sphere of power at the entrance to which the rulership of law terminates. For this sphere of power does not belong to the world of norms and hence cannot be controlled by norms. The full rulership of law cannot be reached. The theory results in a twofold power built upon different foundations, and neither power can affect the other.

This view of the state, therefore, is untenable; as we have already remarked, it is also unreal. For every holder of a public office, — from the elector, the representative, and the king, to the clerk, the minister, and the general, — occupies his office by virtue of a legal title which not only regulates his duties and powers but also installs him personally as a "ruler." The relations between Duguit's "rulers" and "ruled" are not therefore factual relations but legal relations. And since the quality of being a ruler is bestowed by law, there is no authority which is not rooted in law. The rulership inherent in the state can therefore be traced back to a single authority, that of the law.

III. *The Modern Theory of the State.* As a result of this conclusion, which we reach again and again from various points of view, it follows that the idea of the state must be derived from the law, postponing for

later consideration the question of what else is to be included under the *name* of the state. When the state is defined in this way, we can insist that its essence is manifested in the operation of a peculiar and independent sense of right among a portion of mankind. A people is a state because of the body of legal relations (*Rechtsleben*) existing within it. And one state differs from another state because of the particular standard of legal value applied in the valuation of interests. With every new source of legal value we are dealing with a different body of legal relations, and hence with a different state. If only a single nationality is contained in a state, its peculiar body of legal relations is richer and more original, and all the members of the nation contribute to defining the spiritual value to be found in the feeling or sense of right. The civilized states of our own time differ chiefly in respect to the specific body of legal relations which each possesses, based on its distinct nationality. Consequently their inner force and significance as means of raising mankind to a higher spiritual existence is infinitely greater than in earlier times, when the life of the state was discernible only by the subjection of a portion of mankind to a sovereign standing apart from the people. The collective life in the field of law developed late, — far later than in the fields of religion, art, and literature. But since the people have recovered their share in law-making, national bodies of legal relations have manifestly begun to grow up, as well as a body of legal relations for the whole of humanity. The modern idea of the state has its foundation specifically in these bodies of legal relations.

In proportion as the spiritual bonds between the members of a community are loosened, the collective body of legal relations diminishes. Unity of standard is lacking for the valuation of many interests. A state which includes many races or nationalities can be held together only by reducing centralized law-making to a minimum. This was the case particularly in Austria. On the other hand, the spiritual bonds between peoples of different states may so increase as to develop a collective body of legal relations on a more inclusive scale and thus lead to a higher organization of the sense of right. Germany may stand as an example of this process.

At the present time we can hardly imagine a state without some organization of its body of legal relations. Still the idea of the state can be perceived even in primitive social conditions where the spiritual life is little differentiated and organized. In this case also there is a relationship which proceeds for the most part from the instinctive operation of a peculiar and original spiritual life, though the sense of right may not have made itself felt as a distinct element of this life. Even now, as we shall see later, the field of international law illustrates the activity of an unorganized sense of right. In this field, therefore, the idea of the state is manifested in a merely fragmentary way.

In all civilized states, however, we find more or less developed organs to express the sense of right residing in the state. This is the reason why the functioning of a legislative organ is the superficial mark of statehood among a portion of mankind. What this organ is, is

determined by the constitution of the country in question. Nevertheless, the law contained in the constitution is, in the last analysis, as subject to change as law existing anywhere else. History is full of examples in which unorganized law has worked changes in constitutional law in order to make room for a different legislative organ or for one differently constituted.

In every organ devoted to law-making, the idea of the state may be perceived, even in the functioning of communal councils and provincial legislatures when they possess the power of issuing ordinances. These organs, however, are products of a legal system which proceeds from the operation of another and higher source of law and by which their composition and competence are determined. This other and higher source of law, in the case of the unitary state, lies in that sense of right which has been organized and centralized for a community including the communes and provinces. For the part of mankind which occupies a given territory, this sense of right creates all legal value, including that which determines the composition of the "legislative authority" itself. Independently of the organized method of law-making, however, the unorganized sense of right may always make itself felt. The portion of mankind included within a community which is based upon such an independently operating sense of right is a state. This, to be sure, does not mean that all law-making depends upon the state; the sense of right, whatever it may be, cannot be made to cease working. It does mean that the finding of organs for the sense of right lies within the authority of the state.

Consequently if this organization is ineffectual, and if it therefore grants no autonomy to the local communities, the citizens' sense of right is seriously limited so far as the consideration of local interests is concerned. It is almost equivalent to suppressing their legal activity altogether.

If there comes into existence a legislative organ superior to a number of existing states, this may develop into the organ of a larger legal community. This larger community attains the rank of a state when the sense of right contained in it comes to act *independently* and when it attains an organization not rooted in the legal systems of the member states. However, the question whether a composite political community, or federal state, ought to be termed a state, and whether this name should be applied also to its component parts, is not of much practical importance, for the competence of the legislative organs can be determined for the most part from the written constitutional law. In any case we are not concerned with the name but with the nature and idea of the state. The essence of the state is revealed in the working of a common law which forms for a portion of mankind an independent source of legal value. Hence Jellinek's definition of the state will not stand. When he says, "The state is an association of men residing in a specific territory collectively endowed with an underived power to rule," we might accept the definition literally on condition that the power to rule be traced to the rulership of law. The German school, however, does not agree to this, but starts from an established sovereign authority

independent of law. This is precisely the fundamental difference between it and the view presented in this work.

IV. *The State as a Community of Interests.* If the state is a community having an independent source of legal value, its sole function consists in defining the legal value of public and private interests, and this legal value manifests itself in obligations imposed upon certain persons to preserve these interests. The proposition that the state is a *legal* community and therefore shows its vitality only in the operation of the sense of right does away with the notion that the state should be regarded as wholly or in part an institution to care for specific interests. The state accordingly is not a community of interests. It is essential to the modern idea of the state that a people's character as a state should be regarded as consisting exclusively in the operation of an independent source of legal value. It does not consist in the care for any particular interest whatever. There are many public interests, such as peace, order, security, trade, coinage, the administration of justice, legislation, and national defence, which have a legal value; that is, obligations to preserve them are created by law. But they are no more interests of the *state* than all the private interests to which legal value is imputed and for the preservation of which legal obligations exist. The state is exclusively a regulatory power. If preservation of the public interests mentioned above is described as a concern of the state, this can be done only on the ground that their preser-

vation depends upon legal obligations shared by many persons. The basis of these obligations lies in the legal value which is imputed to the interests and which is derived directly or indirectly from the state's original source of law. The same is true, however, of the obligation of parents to educate their children, and since this is a legal obligation, we should have to say that children are educated by the state. The case is exactly the same with all acts or forbearances to which citizens are obliged by rules of law. The debtor who repays borrowed money, the civil official who carries on the work of a bureau, the person who employs his labor in the interests of industry, the judge who prepares and manages a case or draws up and pronounces decisions, the member of parliament who attends a session of the legislature and votes on bills, — all these show by their action the power of law. Hence we have to do in these cases with conduct called forth by the state. All of it is business of the state or none of it is. There is no reason for distinguishing work done in behalf of certain interests (like the administration of justice, the postal and banking systems) as functions of the state, while work done in behalf of other interests (like education, manufacturing, and domestic service) is not regarded as an activity of the state. All these services have one thing in common: They are carried on in pursuance of obligations which are imposed by law and which arise from the legal value imputed to the various interests. The reality of the state is rooted in its control over legal value. This value, so far as its origin is concerned, is the same for all interests; in the absence of such

value there exists no obligation to serve any interest. In this control the state lives and manifests its power.

Consequently we must free ourselves from the old notion, which is emphasized in the literature of constitutional law, that the preservation and administration of law, the care for the general welfare, security, and order are among the functions of the state and that the essence of the political community is to be found in the realization of these ends. On the contrary, we must insist that the state is nothing except a legal community, that is, a portion of mankind having its own original legal standard, its own original source of law, and therefore a portion of mankind having its own independent body of legal relations. Hence the state performs no function whatever except to impute legal value to certain interests. The state can do nothing except to impose the obligation to serve public and private interests.

Two questions arise at this point: First, How does the notion originate that the essence of the state consists in the guardianship of specific interests? Second, Why has the true idea of the state as a legal community emerged in our own times? The answer to these questions is given by the history of the state.

V. *Origin of the State as a Community of Interests.* Even in primitive social conditions the state manifests itself in the operation of a spiritual force among a portion of mankind. The community in this case depends upon kinship and is not strictly speaking a legal community, because the spiritual forces which are effec-

tive in such a community of kinship are not as yet differentiated. The effects of law, morality, and religion can scarcely be distinguished from one another. But even though community of kinship may have led to the founding of some states, it is not kinship which makes a part of mankind, a nation or tribe, into a state. This is accomplished by the spiritual unity which is erected upon this biological foundation.

It may be urged, moreover, that the operation of this spiritual life, and therefore the operation of law, in so far as the latter can be distinguished, may be discerned in the customs and modes of conduct of the members of the community, even before conscious law-making takes place.

But what concerns us most in this case is the question of the interests which share the protection of the law. We may mention the fact in passing that in primitive states the individual was regarded little or not at all and hence it was not his interests that received attention, but rather those of the group or family to which he belonged. Our special attention must be directed again to the very general interests which require to be upheld, especially the military interests, which have to do primarily with preserving the independence of the tribe against other tribes. Anxiety about these interests now manifests itself in the recognition of one member of the community as especially designated to care for them. Because of the right to command which he is allowed to exercise for this purpose he gains the position of chief of the tribe. The idea of sovereignty develops about him, even though it may

be confined to the care for those interests which have occasioned his rise. In the beginning the power of the chief is limited to this single interest of maintaining tribal independence and it is founded in the same legal system which governs the communal life of the tribe.

But when civilization is somewhat more advanced, the care for a number of public interests, such as the administration of justice and trade, is taken up into the chief's sphere of action and consequently his power is notably increased. Moreover, the fact that his office becomes hereditary is a decisive factor in giving him a commanding position and also in determining the legal conception of his position. It gives rise to the notion of a personal right to authority, a notion whicy has long persisted. The typical notion of sovereignth thus emerges. But the right to issue binding commands, which is involved in this notion, is still limited at the start to the preservation of a group of public interests. So far as these interests are concerned, the members of the community stand in a relation of subjection to the chief. In the nature of the case he remains an official who has been charged with the comprehensive task of caring for a certain number of public interests. To this end he makes laws and imposes duties upon the citizens.

With the growth of absolute monarchy the notion appears in practice, and still more in political theory, that the prince is not only an organ for preserving a certain number of important public interests and thus competent to extend the protection of the law to these interests, but that he is also the organ of law in general.

That is, he is regarded as competent not only to make effective the legal value of certain public interests but also to determine legal value itself. He is conceived as the organ through which all authority is exerted and hence all interests, private as well as public, have to derive their rights from him.

The vesting in absolute monarchy of the twofold function of preserving interests and making law has controlled the theory of the state down to our own day. On the one hand, the establishment of absolute monarchy brought forward the conception of the state as a legal community; on the other hand, since the preservation of a number of public interests was a permanent function of the prince, the purpose and essence of the state was conceived to lie in the care for these interests. The transformation of the prince from an official entrusted with the care of certain public interests into an organ of the state conceived as a legal community has seriously hampered an understanding of the nature of the state.

In particular the ideas of power and authority, which are necessarily connected with the state as a legal community, are transferred, in absolute monarchy, to the public interests which the prince must preserve, with the result that these interests are regarded as "powers." Both the older and the more recent literature is saturated with this conception. The "major and minor attributes of royalty" are regarded as elements of the prince's right to govern, when in fact they are nothing more than so many public interests which the prince has to care for. In the same way Bodin's "true

marks of sovereignty" embrace a number of princely rights with reference to certain public interests. When at a later time the need for a decentralization of the functions of government made itself felt and the theory of the separation of powers gained general acceptance, the state was regarded as a complex of three great public interests, viz., the interest of organized legislation, the interest of administering justice, and the interest of enforcing executions and punishments. These three interests had to be administered as separate powers and the whole range of the state's activities was confined to administering them. This view, according to which the state is a complex of interests, has in no wise been outgrown by contemporary political theory. This is especially clear in the German literature, where we find detailed treatments of the police power, the finance power, the ecclesiastical power, etc.

Since the same organ which can exert power as an organ of law was entrusted also with the care of public interests, interests and powers were identified, with the result that the public interests which were cared for by the king were regarded for precisely this reason as having an intrinsically superior value. This view brought with it a difference of principle between public and private law. The fact was overlooked that the king, in so far as he cared for certain interests, was in this respect on precisely the same level as any other person who had a similar duty and that he could claim validity for his interests only in so far as their legal value was recognized. This was overlooked because the king was at the same time the organ of the state and as such had

control over legal value. For this reason whatever the king undertook was impressed with the seal of authority. There was one exception, however, which has significance for the opposition between the state as a complex of interests and as a legal community. In certain cases the king employed the ordinary law as a means of caring for the interests entrusted to him and so acted within the sphere of private law. When this happened it was perceived that he did not really act in behalf of the state but in behalf of a complex of interests and that these interests could gain advantage over other interests only by proving their legal value in the eyes of the private law. On the contrary, the state "as such," that is, as a source of law which creates its own values, never manifested itself otherwise than by exerting authority. The perception of this fact called forth the distinction between the state as sovereign and the state as fisc. The latter term expressed in part the dormant perception that in this case it was not the state which acted but one of the many social interests, though it was still assumed that these interests stood in close relation to the state, since they were cared for by the same organ which was called upon to represent the state as a legal community.

Hence the view still prevails, that the state itself acts for the preservation of specific interests, such as national defense, the administration of justice, trade, and the relief of the poor. This is due to the circumstance that absolute monarchy (that is, the form of government in which the prince is the organ of law) grew up by concentrating the care of many public in-

terests in one and the same organ or one and the same functionary, so that legislation and the preserving of interests were united in the same hands. The same circumstance gave rise to the view which has not yet disappeared, that certain public interests *per se*, and therefore without reference to any process of legal valuation, have a superior legal status. Hence also arose the distinction in principle between public and private law, which appears as a distinction between the persons whose mutual relations are regulated. In private law representatives of interests confront each other on equal terms, but in public law they are of unequal standing, the sovereign as against the citizen-subject. Finally the same circumstance gave rise to the insoluble question whether the state can be bound by law, a question which was answered affirmatively or negatively according as the state was conceived as the possessor of a complex of public interests or as a legal community.

VI. *Origin of the State as a Legal Community.* We come now to the second of the two questions raised above, viz., Why has the true idea of the state finally emerged in practice and theory? Why should we now be coming to consider the state as exclusively a legal community, and hence as manifesting the operation of an original, independent source of value?

The constitutional system, at least on the Continent, made its entrance at the end of the eighteenth and beginning of the nineteenth century in the form of the constitutional monarchy. Its importance consisted for

the most part in the fact that the people came to share in the exercise of the state's authority. The "people" in this case was not indeed the whole people. Only a small group of the socially favored gained representation. But the chief point was that the exercise of the prince's authority had to be shared with the people. But what authority was thus shared? Was it the authority of the prince as an organ for preserving a certain complex of interests, that is, as chief functionary of the commonwealth, or the authority which he exercised as an organ of law? As is well known, it was chiefly a share in the latter authority which was transferred to the representative body. It was only in the exceptional case that this body had a share in what was called the administrative function of the state. Aside from co-operation in the concluding of treaties, the legislature's share in administrative matters consisted mainly in its control over the budget by means of which it had a voice in the apportionment of revenues.

The most significant point, however, was the participation of the people in the exercise of legislative power. This as yet did not mean a participation in legislation throughout its entire extent, but merely a share either in establishing the civil and criminal law or with reference to certain specified objects. In particular, the competence of the people to share in legislation for public interests was long denied. Its interference was excluded from all that concerned public peace, order, security, or in general, in the terminology of the time, the police power of the state. Hence the controversy over the extent of the ordinance-issuing power

which belonged to the king alone, in comparison with the legislative power which he had to share with the legislative assembly. But however limited a part the representative assembly may have had at the start in exercising the authority of the state, the first step was made in distinguishing between an organ of the state conceived as a complex of interests and an organ of the state conceived as a legal community. A complete separation of these two aspects of the state first occurs when the popular assembly begins to function as the sole organ of law and the administration is excluded from legislation, either because of the introduction of the republican form of government or because of the development of the constitutional monarchy into the parliamentary system. The administration was thus left with the function of serving as an organ for the complex of public interests, and the combination of both attributes in one person, which had been introduced by absolute monarchy, came to an end. The separation made it possible to subject the "head of the state" to the law and also to meet the demand that the public interests of which the king was the organ should be effective only in so far as they had a legal value, like any other interests. The accomplishment of this demand is expressed in the theory of the legal state.

The establishment of an organ intended solely for law-making and the subordination (required by the theory of the legal state) of monarchy with its tradition of absolutism gradually brought about in practice the idea that the real essence of the state is to be found

in the community of law. This was due to the fact that the law was accepted as the only binding authority, and that the old idea of sovereignty which posited a personal right to authority had disappeared. Already in Kant [1]) we find this notion of the state suggested when he says, "A state (*civitas*) is the union of a number of men under laws." After him, both Stahl and Lasson expressed the same idea in the formula: "The state is the objectified legal system." But in neither case was the idea contained in this formula clearly understood, because at that time legislation had still only a slight importance, occurred only occasionally, and in its more important aspects was directed rather at codification than at reform. Attention was directed far more toward the every-day activity of the administrative authority which guaranteed peace, order, and security by means of the soldiery and police who were subject to its commands, or toward the fiscal authority which took from the citizens a part of their income, or toward the judiciary which made the administration of justice felt by the people through its power to punish or to levy executions upon property. This was an authority, a sovereign. And since the notion of sovereignty had been bound up from antiquity with the conception of the state, the manifestations of the state's authority were recognized prevailingly in these activities. The idea was not developed that all these activities were the outcome of the legal value attributed to public interests and that accordingly an exercise of authority took place only because of the recog-

[1]) *The Philosophy of Law*, Sect. 45; English translation by W. Hastie.

nition of this legal value. This idea could mature only after legislation got into full swing in the second half of the nineteenth century, that is, after legislation for both public and private interests began to flow in great volume. In the case of public interests, this legislation took the form of an extension of administrative law which created a system different from ordinary law for administrative operations. In the case of private interests, the rise of social legislation is an evidence of the increasing control of law, since now many private interests are invested with a legal value which formerly had no legal protection, or only an insufficient one. Thus it becomes clearer and clearer that the *law* is the only essential source of authority, since both public and private interests derive their force from it. And this reveals at once the essential nature of the state, viz., that it is a legal community. The old and oft-repeated view that power is the attribute of the state, and the definition of the state as a manifestation of power, can be conceded only if it be granted that this power reveals itself in law and can have no effect except in issuing rules of law. Thus it must be insisted that the state reveals itself only in the making of law, whether it be by legislative enactment or by the unwritten law. The state, therefore, does not manifest itself in administering punishments or by levying executions, nor in the work of the judge, the army, and the police, nor in the deliberations and balloting of representatives and the election of deputies, nor in delivering telegrams and letters, nor in building railroads and mines, nor in paying pensions to the aged and infirm, nor in the manage-

ment of savings-banks. In a word, it does not manifest itself in any sort of activity for the purpose of maintaining any sort of interest whatever. We regard the state as manifesting itself solely in the activity of those sources of value which raise a rule to the status of a rule of law and by virtue of which all these other activities are carried on.

VII. *The Organization of the Community of Interests.* It would be desirable for both political practice and political theory to make a distinction in terminology between the state as a legal community and the state as a complex of interests. In our constitutional law this distinction is made, for the state as a complex of interests is known by the name of Kingdom (*Reich*). But as a rule no distinction is made and the different branches of the administration are regarded as parts of the *state*. Thus the belief is fostered that the essence of the state is shown in the care for specific interests. The backwardness of terminology in this respect is due to the idea that these parts of the administration have their point of unity in the government (*Regierung*) and that the government is to be regarded as the central organ of the state. But as time goes on, this idea accords less and less with reality.

In the first place, it is becoming more and more clear that the state as a complex of interests is not a unity. It is not a unity in the material sense that any particular group of interests is to be regarded as specifically interests of the state, nor in the formal sense that all public interests ought to be subject to the care

of one and the same organ, the government. That the state is not a unity in the material sense has been shown repeatedly in what has already been said; we have had to speak throughout of a complex of public interests. It is possible, of course, to point out interests which *must* be cared for, but this would hold equally of both public and private interests. Among the civilized states of our own time there is no longer any which permits slavery. In every state the interests of all individuals must have their weight in the community, the same as the public interest of administering justice or transmitting the mail must be provided for. But the care for these public interests, like the care for all others, arises from the legal value imputed to them and hence they are not to be regarded as the sole interests of the state, nor are they interests of the state in either a greater or a less degree than any other interests which are accorded the protection of the law.

In a formal sense also the complex of interests which falls within the limits of the state does not form a unity. For the time has long gone by when the care for these interests was entrusted to a single organ, the king, who performed his task through the agency of a staff of subordinates. A decentralization has taken place as a result of which various branches of the service have been assigned to more or less independent authorities. We perceive this, in the first place, in the ministries, which are so many independently functioning branches of the administration, at least in those countries where ministerial responsibility has displaced the ruling power of the king. This decentralization

is still more evident in those cases where special organizations, standing over against the government in a more or less independent fashion, have been created to care for public interests. Sometimes, as in the case of the National Postal Savings Bank, these are treated as legal persons and are so considered by the courts. The oldest independent branch of the administration is that entrusted with administering justice, at least in so far as it is concerned with the civil and criminal law. At the present time, however, many other public interests have organizations which are independent of the government. If then we continue to speak in terms of the theory of the separation of powers, there have developed a whole group of powers beside the judicial power. The post-office, the telephone and telegraph service, the bureau of mines, the mint, the public health service, the universities, the insurance department, the bureau of labor inspection, have developed into corporations which are more or less independent of government and which have in part their own budgets of income and expenditure. Thus it is possible to point out a number of branches of administration in which something that was formerly subject to the direct care of the government under the name of its executive power has now become independent of it. In the case of a whole group of interests possessing importance throughout the entire territory of the state, the plan of committing them to the care of independent organs has been realized, or is in process of being realized. But no matter how far this decentralization may go, there will always be a complex of interests left over for which

the government will have to provide. The latter is the organ for the whole country (*Reich*), that is, for all those public interests which are co-extensive with the state and which are not provided for by some special organ. The French publicist, Duguit, [1]) who has shown himself unusually sensitive to the real organization of the state as a community of interests, imagines a future in which all branches of public service, including the army and the police, shall be organized as independent corporations. But even so, there would always be left over a certain number of transitory and unforeseen interests for which the government would necessarily serve as an organ. But in proportion as the decentralization of administration proceeds, the government's circle of activity as an organ of interests grows narrower. Thus the government could devote its energy to the preparation of legislation far more than is now the case.

Whatever the future may bring forth, however, it is already clear that the administration of public interests is no longer united in the organ of government as it formerly was when the whole business of administration was fa unction of government to be performed by officials subordinate to it. The unity of public interests must be sought rather in an association of administrative departments arising from law, the organization of these departments being itself regulated by law. Thus we see that a type of decentralization is gradually taking place quite different from that which occurs in

[1]) *Le droit social, le droit individuel et la transformation de l'état*, 1908; *Les transformations du droit public*, 1913.

the self-government of provinces and communes. This is a decentralization according to interest to provide for all those public interests which concern the state as a community. Up to the present time this decentralization has appeared only by way of establishing independent branches of administration which approximate in form to corporations. Legislative competence has been given them only in sporadic instances. Thus the board to supervise the enforcement of labor legislation has the right in certain cases to make legal rules for the interests entrusted to it.[1]) The need for an extension of legislative organs has already been pointed out. Hence it is not improbable that administrative decentralization will result in giving legislative authority to the administrative organs of those interests which cannot be adequately cared for without it.

In this decentralization, which is obviously progressing steadily, more and more kinds of interests appear as public interests and thus call into being special branches of administration to care for them. This shows clearly that the concept of the state must not be defined by reference to the care for any specific interests whatever, but solely by reference to the unique and original source of law from which all these interests, and all other interests, derive their legal value. But political science is still dominated by a concept of the state derived from absolute monarchy. In this form of government, legislation was a very small part of what the prince had to do, his normal function being the care for a certain number of public interests. In modern politi-

[1]) *Statutes on Safety Devices for Labor and on Stoneworkers.*

cal theory the "state" has come to possess the power of the prince. What formerly was described as the royal authority is now regarded as the task of the state. Thus the twofold function which was included in the royal authority has been transferred to the state, though it was only the king's law-making function which could properly be regarded as an activity of the state. Political theory still suffers from the effects of this confusion. In all the duties to be performed in the care for public interests it perceives something different from the duties to be performed on account of the private interests of citizens. It describes the former as affairs of state, because by putting the state in the place of the king, everything that was formerly done by the king, including his care for public interests, has to be regarded now as the task of the "state." It was forgotten that in these cases the king acted merely as a functionary with a staff of subordinates, just as now hundreds of thousands are put directly into the service of public interests. The meaning of the state does not lie in the care for any interests, but solely in the fact that it establishes the *legal value* of interests. The state as a legal community was undoubtedly brought into the foreground by absolute monarchy, but since this form of government originated by concentrating the care for public interests in one organ, the king, it was responsible also for the fact that even down to our own time the essential attribute of the state has been found in the care for this or that interest. It was not until the introduction of the representative system that law-making was able to detach itself from the care for interests. It

was not until the second half of the nineteenth century that the enormous volume of legislation resulted in a re-awakened consciousness of the importance of law. These two facts sharpened men's insight into the nature of the state and caused it to be recognized as a legal community.

Nothing is more indicative of the confusion in contemporary political theory than its teaching regarding the relation between the state and law. The state is interpreted at once as a law-creating personality and as subject to law. This manifest contradiction is insoluble. The complex of public interests must be excluded from the concept of the state and the latter must be conceived as nothing except a legal community. If this is done, it will be seen that what is called the subjection of the state to law means only the subjection of public interests to law. The state as a legal community, as a part of mankind within which there exists and acts an original source of legal values, is subject to nothing, for law is by nature "sovereign."

When the theory of the state has reached this point, it is confronted with a further problem. The concept of the state as a legal community must be brought into agreement with an international law whose binding force even upon states must involve no contradiction.

The answer to this question leads us finally to a discussion of the nature of international law.

CHAPTER X

THE INTERNATIONAL LEGAL COMMUNITY

I. *The Authority of International Law.* A. *The Derivation of its Authority from the Authority of the State.* As is now generally recognized both in theory and practice, international law has as good a claim to the name of law as that which springs from the national legal community. But the explanation of the supremacy of law in the international field is subject to the influence of the idea of sovereignty, just as the idea of the state and the binding force of national law have been.

The earlier view based the supremacy of law upon a power outside the law, and this power was found in the state. The state is the personification of sovereignty or of the original right to rule. So long as this view prevails, the supremacy of international law also must be based upon the authority of the state. An independent rulership of international law can never be achieved by this means. And without *independent* supremacy one cannot speak of law. Writers sometimes fail to note the contradictions in which they are involved. For example, De Louter [1]) maintains that international law is built up from below by the free will of states and also derives its sanction from this will. But if this were true, international law would immediately lose its validity

[1]) *Het stellig volkenrecht*, 1910, Vol. I, pp. 17 ff.

for any state which revoked its sanction to it. This theory can lead no farther than to a self-limitation. And nothing is gained by distinguishing between a *legal competence* which remains intact and a *competence to act* which is limited, since this limitation, according to the argument before us, has proceeded from the state's own will. Nevertheless, this same author insists upon the untenableness of the theory that "a sovereign state is limited by its own will no longer than this will continues," since this "would undermine the foundation upon which the structure of international law rests." And yet this is exactly the view which logically follows from his own explanation of the validity of international law. International law cannot be built upon the unreal foundation of the sovereignty of the state. Yet this is continually attempted. Ullmann [1]), for example, recognizes the existence of an international community, perceives that this involves limitations upon states, but remains ensnared in the idea of state sovereignty and is therefore compelled to trace the force of international law back to a "self-limitation" of the state. He says that from the juristic point of view "one cannot properly speak of an *actual impairment* of the state's natural autonomy and independence in the field of international legal activity, since everything which the state undertakes with a view to the protection and care of collective interests and obligations is rooted in the last analysis precisely in its autonomy and independence, — in its *sovereignty* and its *free personality* in interna-

[1]) *Völkerrecht*, 1908, p. 6; Marquardsen's *Handbuch des öffentlichen Rechts*, I, II, 2.

tional law. It is by virtue of its sovereignty and its consequent capacity of limiting its own will by autonomous acts that there exists the possibility of an orderly relationship in the lives of states and nations."

It is clear that adherence to the idea of sovereignty, and to the idea of the ultimateness of the authority peculiar to the state, leads this author to surrender the "autonomy" of law, as does Jellinek in the field of public law. Thus they are led to base the binding force of law upon the very thing which should be the object of control, namely, the will.

The difficulty which confronts one with reference to international law is generally summarized in the antithesis that national law derives its binding force from a sovereign, a ruling power, an authority, while the imperative force of international law does not depend upon any such central, law-creating power. Von Liszt [1]) expresses this contrast in the statement that international law rests upon the principle of association, while national law rests upon the principle of rulership. This principle of association, however, is only a name for the point of view represented by von Liszt, that in the international community the will of this community is nothing more than the collective will of the members, that is, of the states. "In the international community, the will of the whole, whether determined expressly in congresses of states or discoverable only in the practice of states, is *nothing else than the will of the collective individuals.*" But this is really only another way of stating the prevailing view that in international law the

[1]) *Das Völkerrecht*, Ed. 11, 1918, p 6.

state is not bound, but binds itself. Therefore, even von Liszt, for the purpose of more exact definition, adds to the words quoted above the statement, "that international arrangements bind only those states which *wish* to bind *themselves*."

B. *Criticism.* In fact, however, the difficulty presented above exists for national law no less than for international. In the preceding sections of this work it has been shown repeatedly that a self-supporting sovereign authority is a fiction, and that in consequence even national law cannot derive its binding force from such a source. National and international law from this point of view stand in exactly the same position. If this is so, the binding force of international law also is based upon its spiritual nature and therefore upon the fact that it is a product of men's sense of right. It rules by virtue of this nature, compels men to act according to its rules, and itself stands above the will. International law is distinguished from national law not in respect to its origin and foundation, but in respect to the extent of the community to which its commands apply. And the incomplete and less perfect character of international law does not lie in the fact that it rules over "sovereign" states and is therefore rooted in the will of these states. It lies rather in the defective organization of the sense of right which tends to regulate the community of civilized nations. Both the making of international law and its administration and enforcement by means of an adequate judiciary remain still in the most elementary stages of organization while all this has already been developed to systematic com-

pleteness for national law. The satisfaction of this need for an organization of international law is a problem which is now attracting the widest attention. So far as the organization of the international community is concerned, we are still living in the Middle Ages, when the political relation between citizens was as fragmentary and incomplete as that between nations at the present time. Legislation, judicature, and the administration of law were then as defectively organized throughout as is now the case in the international community. But we have reason to expect that the international organization will be established somewhat more quickly and with less human sacrifice than was needed to bring the political order of the civilized world to its present level. As a result of the increasing contact between members of all nations, the operation of the sense of right which must produce this supernational organization has become far more powerful and more inclusive than in earlier times. The results of this fact appear very clearly in the numerous international legal arrangements which have been established in the last half-century. Consequently, even though one cannot as yet speak of a legal community including all states, still the existing legal communities, or states, no longer have the self-sufficiency which current political science represents them as having in theory. The idea of the state is beginning to overstep the limits of the national state and to realize itself fragmentarily in larger legal communities, which offer a new and higher legal value to human interests than could grow out of the smaller legal communities. We have entered, therefore, upon

the way which leads to the formation of greater states. In so far as law-making by these greater communities actually takes place, the legal activity of the existing states must contract. The ultimate source of legal values is transferred to these greater communities, and the present national communities lose their character as states to continue their existence with a more or less derivative autonomy. Toward this process, which is taking place before our eyes, our attention must be repeatedly directed in the following pages.

II. *The Content of International Law.* A. *The Significance of International Law for the State as a Legal Community.* Among the oldest interests whose legal value is rooted in international law, there stands out the interest which a nation has of determining its public order according to its own legal standards. To define it otherwise, it is the interest which a nation has in creating a state. The value of this interest is no more unconditional than that of any other interest; and hence it falls to international law to determine its legal value. In order that this may be done, however, it must be made clear to the outside world that the nation really has a right to be a state or independent legal community. This is shown by the existence of an organization proceeding from its own national law, either written or unwritten, competent to enforce this law. In order that the real importance of this national interest may stand above question, there must exist a legal order providing for legislation, for the administration of justice, and for the machinery needed to

enforce the law. It is only after the interest of a nation in leading its own legal life has been sanctioned by national law that this interest can receive legal sanction from the international community, thus determining the right of the nation to form a state. Sometimes, however, the character of a state is conferred upon a nation irrespective of its possessing its own organization as a state and an organization is set up by means of international law, as was done in the case of Albania.

A nation's character as a state, therefore, is rooted in a law which is international in scope. A nation has no natural right to lead an independent legal life. If the legal value of the interests of the international community is not furthered by such an independent legal life, the claims of a nation to regulate its own communal life according to its own legal standards are invalid. And the sense of right of the international community expresses itself with reference to these claims when a nation is recognized in any manner as a state by other states, though it is not necessary that this recognition shall proceed from *all* states. In this case also there must be a single standard if the law is to be the standard of a community. This can usually be attained only by allowing a majority to decide.

If the right of a nation to be a state is rooted in international law, it is self-evident that international law may determine also how far this right extends; but international law has no further significance for the state as a legal community. It can only impose limitations upon a nation's legal activity. The state as a legal community cannot be subjected to any sort of obliga-

tions, since such obligations would amount to a demand that it create an order according to a different legal standard from that which belongs to it as a legal community; this would be equivalent to the nullification of its character as a state. To be sure, an international regulation can obligate the legislature or the government to elaborate this regulation by more detailed prescriptions, but in this case these bodies function not as organs of the state as a legal community, but as organs of the international legal community. The legal activity of a state manifests itself exclusively in setting up special, ultimate legal standards which distinguish one state from another. Freedom and independence in law-making, therefore, are indefeasibly connected with the state. Consequently international law can do nothing but limit the state in respect to the interests for which it is permitted to lay down rules in accordance with its own legal standard. Any sort of interests may be withdrawn from its legal regulation, but the legal standards which are applied must remain uncurtailed, if its character as a state is not to be lost. Whenever any interest has been recognized as having legal value by the international legal community, therefore, the competence of the state as a legal community undergoes a limitation with reference to the valuation of such interests.

B. *The Subjects of International Law.* If, however, international law lays no obligations upon states, who then is subject to its obligations? This depends entirely upon the nature of the interests which have been regulated by international law. If they are special interests

of citizens, as is usually the case in private international law, the subjects are individuals. If they are public interests, then those who are intrusted by constitutional law with the care of these interests are the subjects; for example, a judge who by virtue of a treaty has to validate the subpoena of a foreign court or to render judgment in accordance with the rules of international law; or a government which is called upon to manage postal, telegraph, and telephone services in accordance with international legal agreements; or a legislature which must appropriate money for the execution of treaties; or the state postal savings-bank, when by virtue of a treaty with Belgium it has to register transfers and assignments in the Dutch-Belgian savings-bank books; or the police, when they have to carry out any sort of obligations because of treaties relating to domicile and extradition. All these obligations, however, are now commonly regarded as obligations of the state. It has already been shown that this cannot mean the state as a legal community. But does it have a better sense, if the state as a community of interests is regarded as the subject of such obligations? This can scarcely be maintained, since the state as a community of interests does not constitute a unity. A community of interests forms a unity because of its devotion to specific interests and the achievment of specific purposes. But what interests are cared for by the community which is called the state? We have already considered this question. No one can say that care for this or that interest is an essential element of the state. There have been states without a judiciary,

without legislation, without a postal service, an administration of mines, a ministry of education, or an administration of highways. That these interests are provided for nowadays results from their having been recognized as having a legal value. But if a conclusion as to what are state interests is to be based upon this recognition of legal value, it must follow that all interests which enjoy legal protection are state interests. There would be no objection to this as a matter of terminology, if it had any bearing upon the nature of the state. But this is not the case, for there is no limit to the interests which may come under consideration as having legal value and the question cannot be settled *a priori*. New interests appear within the field of law; old interests, such as religious ones, are removed from it. There are no interests which must be recognized invariably as state interests; and therefore the distinguishing characteristic of the state, in contrast to other communities, cannot be found in its care for any sort of interests. They come to be state interests only when a legal value is accorded them; the state itself, therefore, exists only where this legal value flows from an inherent and independent source. The specific purpose which is contained in the idea of the state and which brings men together into an association different from all other communities is the right of a nation to realize its own legal ideal.

It is meaningless, therefore, to call the state, conceived as a community of interests, the subject of international law, for in this sense the word "state" signifies merely a complex of interests which diminishes

or increases according as fewer or more interests are endowed with a legal value. Those *individuals* are subjects of international law to whom powers and obligations attach as defenders of the interests with which that law is concerned. It is not merely juristically inaccurate to consider treaty rights and treaty obligations as rights and obligations of the state; it also confuses the facts of legal relation thus to make fictions the possessors of rights. It may perhaps be defensible, for the sake of brevity, to follow common usage and to call the state, as a community of interests, the subject of international law, and this is in fact the case. But in the interests of accuracy, this must be understood as an indirect way of referring to the men who have to obey the rules of international law. But it is in fact not so understood. When the Dutch "state" is said to be bound by treaties, this tells us nothing about the persons who in reality are subject to these obligations. The persons referred to may be the government, the judges, the state's attorney, the legislature, the mayor, a board of dike commissioners, or a private person. Which of these is subject to the commands of international law depends upon what interests have come to have their values assessed by this law, and what persons have been designated by constitutional law (national or international) to care for these interests.

How then does it happen that according to the prevailing theory states are looked upon as subjects of international law, and indeed that the specific nature of international law is deemed to consist in the fact that

it regulates the reciprocal legal relations of a special kind of subjects, namely states?

This question may be answered by referring to the conception of the state which has repeatedly been shown to be inaccurate in the preceding pages. The essence of this conception is the subjection of a part of humanity to a sovereign, or according to German terminology to a person endowed with an ultimate right to rule. Hence it recognizes a natural authority over men existing outside the law. So long as this view is maintained, international law can affect individuals only by the interposition of this sovereign, or the state, conceived as a ruling subject. "Individuals come into consideration only as objects of rulership and protection." [1]) The commands of international law must be directed to the sovereign, or to the state, and therefore only states are to be regarded as its subjects.

Since the citizens are not directly subject to international law, this argument obviously leads to the conclusion that with every extension of international law the national sovereign must re-enact the new provisions. Citizens are subject to the commands of no one except the national sovereign. What their sovereign may agree upon with other sovereigns in no wise concerns them. They have to regulate their conduct only with reference to what their natural lord and master is pleased to command. And thus, under the stress of this theory, it has become the practice in some countries that a treaty imposing obligations upon the custodians of public or private interests must be re-enacted

[1]) Heilborn, *Handbuch des Völkerrechts*, Vol. I, p. 95.

in the form of a statute before they are obliged to observe it.

This perverted practice and artificial theory collapse as soon as one perceives the fallacy of a political doctrine which still adheres to an absolutist conception of the state, though it makes a distinction in terms by substituting a legal person for a personal sovereign as the natural ruler. The currency which the modern idea of the state has already secured makes it daily more evident that, as there is no authority within the limits of a state except that of the law, so the same authority must be recognized as a regulating power outside it, in communities which include several states. Law rules by its own force in the international community exactly as it does within the state. This means that legal values arising from the international community impose their obligations directly upon every individual who has to care for interests the legal value of which is fixed in international law. There is no interposition of a hypothetical state authority. The name, *International Law*, is really a misnomer; the name is suitable only to the theory which regards states as subjects of this law and which consequently regards it as a law *between* states. It would be better, therefore, to speak of a *supernational* law, since this expresses the idea that we are dealing with a law which regulates a community of men embracing several states and which possesses a correspondingly higher validity than that attaching to national law.

C. *The Connection between National and International Law.* The content of international law is just as little

capable of being determined *a priori* as that of national law. All human interests might be regulated by the supernational law, and we are witnesses to the fact that an increasing number of interests are continually being committed to its protection. Consequently we might divide this law into private law, criminal law, the law of procedure, administrative, and constitutional law. What is usually called the law of nations (*Völkerrecht*) is really international constitutional law. But this term no longer corresponds to the actual meaning of the law to which it relates, since it suggests legal relationships between states, while in fact, international law is a complex of obligations to be discharged by individuals. As a result of these obligations organs are called into existence for certain public interests and their activity is regulated; or it may be that the competence of organs already existing, arising out of national law, is defined. All this, however, belongs to constitutional law in the sense in which that term is properly used. Thus there are already supernational tribunals; for example, the Central Commission for the Navigation of the Rhine, which includes a Court of Arbitration whose organization forms the beginning of a supernational constitutional law. But for the most part the supernational law makes use of national organs, the legislature, the government, judges, the police, etc., and hence it merely brings about a change in the competence of these organs as regulated by national law. Since the law of nations has now developed into a supernational constitutional law, it would be better in the future to use this term, thus carrying out in termi-

nology the parallelism between national and supernational law.

It is becoming less and less sufficient to confine our attention to the national law in order to secure a knowledge of the law under which a nation lives. Every branch of the law is extending itself more and more into the field of supernational law, so that powers and obligations must be derived in turn now from the one, now from the other. The one law is distinguished from the other neither in respect to its binding force, nor its content, nor its subjects. The difference between the two systems of law lies only in the fact that supernational law is effective for a larger community and therefore the evaluations springing from it possess a higher legal worth. Just so long as political theory clings to the idea of sovereignty and therefore holds that the state consists in the subjection of the nation to a sovereign lying outside the law, the co-ordination of supernational law with national law cannot be effective. It follows from the idea of sovereignty that the validity of supernational law is left without support, for there is no sovereignty in the international community. It follows moreover that the content of international law depends upon what the state has drawn into the circle of its own functions, for there is no direct connection between the international community and the interests to be evaluated, but these interests can be provided for only indirectly through the state. And finally, only states can be subjects of international law, since the international community can never be anything except a n association of sovereigns. But positive supernational

law directly contradicts every one of these three conclusions which follow from the idea of sovereignty. Consequently, wherever in the literature the discussion of any part of international law requires a theoretical treatment of its principles, the result is either a thorough-going contradiction or a mere logical construction based on arbitrary and fictitious ideas. International law can be elevated to the rank of a real science only when the modern idea of the state is fully and clearly understood and when, as a result, the idea of sovereignty is discarded and all authority is traced back to the authority of law. In this way, international law has, or can have, the same foundation, the same content, and the same subjects as national law.

III. *The Creation of International Law.* A. *Organs.* International law, like all other law, is a product of the operation of men's sense of right, but it has had hitherto a much narrower foundation than national law, the validity of which, as a result of the representative system, is rooted in the sense of right of the whole population which is competent to make law. International law still rests in great part upon the legal convictions of those who have to care for the interests with which international law is concerned. In so far as international law is related to private law, the legal convictions of particular persons are taken into consideration; but since these convictions are not organized, they exercise only a slight influence upon the shaping of this law. For public law, that is to say for the law which embodies the legal rules of public interests, the

legal conceptions of those persons who are concerned with these interests, namely organs of administration, might be able collectively to control the making of law in their own fields. But international constitutional law knows no such organization. The judicial power, the postal, the telegraph, and the telephone officials, the savings-banks and state insurance commissions of the different countries are for the most part not in direct communication, and indeed according to international law are not competent to conclude treaties concerning the interests confided to their care. So far, however, as they do have a common concern for matters of any sort, a practice occasionally develops which may be regarded as a part of international law. As a rule only the central organ, the government, is recognized as a legislative organ. According to international constitutional law it alone is competent, in co-operation with the governments of other states, to make international law both for those interests entrusted to its care and for all interests generally. As yet the representative body has but a small share in the making of international law. Its co-operation is required only in certain kinds of treaties, and then exclusively in the form of an approval which, moreover, is given only after the conclusion of the treaty by the respective governments; thus it possesses merely a right of veto.

In the making of international law, therefore, it is chiefly the legal conceptions of the governments which are decisive. But it is clear that these are not entirely unconnected with the national sense of right. The influence of this sense of right, however, aside from the

approval of treaties, is unorganized, and consequently can scarcely be effective in the ordinary intercourse between states. Only when the vital interests of the nation are at stake does the national sense of right exert a powerful influence and when this happens the government is frequently subject to pressure from convictions and conceptions which have been formed *without a complete knowledge of the relationships*. Consequently one of the greatest defects in the making of international law lies precisely in the lack of an organization in the different states such as would insure the existence of a popular organ which, like the government, would be in constant touch with international interests. This might be either a special organ or the one already existing for law-making within the state. The sense of right represented by this organ, being supported by a knowledge of the interests concerned, could make itself effective in the field of international law. Such an organization is the first object to be striven for in the immediate future and pacifism ought to devote all its energy to this end. With reference to the vital interests of a nation which are at stake in decisions concerning war and peace, the national sense of right ought to have the last word, just as in most states this sense is already decisive with reference to national legal interests. But in this case also the legal conviction of a nation can be fruitful only when it *actually knows* the existing relationships, the interests which are opposed to one another. And hence the very first thing to which we should turn our attention is the breaking of the government's *monopoly* of knowledge

regarding international relationships, particularly those of an international legal nature. Such provisions as those in our Constitution which reserve to the government the right to decide whether the interest of the state permits the communication of treaties to the States General, and which even in case of a declaration of war make it possible that the States General may receive only such communications as the government believes compatible with the interest of the state, must no longer be tolerated. Such provisions designedly keep the people's representatives in ignorance of matters which may relate to the highest interests of the fatherland. An entirely different spirit ought to inspire the constitutional law of states in this matter. With reference to their international relations also it should be not the sudden blaze of an uninformed sense of right, but the enlightened conviction of the nation based on a knowledge of the matter in all its aspects, which should give direction to the conduct of the government.

How does the formation of international law take place?

B. *Customary Law.* In the first place, we must take account of customary law, whose validity depends upon the legal convictions of governments regarding their conduct toward one another, or regarding the conduct of states toward other states. The supremacy of customary law, its objective validity, depends upon the force of these convictions, just as in the case of national customary law. The authority of a rule of customary law increases in proportion as it is more gen-

erally felt to be law. At the basis of customary law, therefore, there lies a community of legal conviction, a common sense of right, with reference to certain interests and this manifests itself in fixed modes of conduct. Those who place themselves outside this community undergo the corresponding criticism which their conduct calls forth in others. If this criticism fails to materialize, it is a sure indication that the customary law has lost its validity. The more powerful and the more general it is, the greater is the validity of the customary law. Nevertheless customary law is binding also upon those who place themselves outside the legal community from which it springs. This follows from the fact already established, that the need for unity of law requires that the majority shall rule.

In contrast to national law, therefore, the existence of international law must be attested by the behavior of those who belong to the legal community; an organ, the judge, who decides concerning the existence of a customary law, is beginning to develop sporadically. When a general court of arbitration, competent to deal with all legal conflicts between certain countries, is provided for by treaty, the validity of customary law gains a firmer basis than when the existence of customary law is settled merely by the accidental manifestations of conviction in other states.

C. *Treaty-law.* The second point to consider is the making of law by means of treaties. Every treaty establishes between the states which are parties to it a community of legal conviction with reference to certain interests. In this respect there is no difference

between the basis of law created by treaty and that which springs from custom. In both a legal community is established; but in the case of customary law, its existence must be inferred from the conduct of the states, while in the case of treaties its existence is proved by rules expressly laid down by the contracting parties to govern their future conduct. Every treaty, therefore, embodies a piece of international law which, like all other law, owes its validity to the community of legal conviction which has settled the content of its obligations. As a rule, the law created by a treaty does not extend further than to the members of this community, i.e., to the contracting parties. We say, "as a rule," for this is true only when the legislation relates exclusively to the special interests of the contracting states. If, for example, Holland concludes a treaty with Germany for maintaining beacons along the River Ems or for equipping it with floating or standing marks of navigation, the obligations created by the treaty are limited to these two countries. If, however, the object of the treaty relates to more general interests, if several states establish rules regarding neutrality, extradition, marriage, divorce, guardianship, the circulation of bills of exchange, etc., then certainly the citizens of these states and their organs of public interests, and especially their governments, are primarily bound to observe these rules. But since the interests for which the international law in these cases has been established are not exclusively interests of the contracting parties, these treaties constitute a piece of international law which, in proportion to the number of

states which have had a share in it, bears witness to a sense of right so widely extended that other states also will feel themselves more or less bound by it. Consequently it cannot be maintained that in international law a treaty is binding only upon the parties that have consented to it. A piece of international law established by a considerable number of states operates in exactly the same manner as if a customary law had grown up with reference to the matter regulated by it. And as customary law binds those also who stand outside the community from which it springs, so it repeatedly happens that rules regarding certain general interests which have been reached by a community of states formed for a particular purpose are binding upon other states also which had no share in concluding the treaty. No one will maintain that the provisions of the Treaty of Washington, of the Treaty of Paris of 1856, and the like, are valid only in respect to the interests of the contracting parties. On the contrary these provisions have gained universal significance, whether other states have given their adherence to them or not. Such treaties have awakened a sense of right in all civilized states, and have formed the basis for a written customary law.

What we have observed above with reference to customary law is true also of treaty-law, namely, that its observance in most cases is guaranteed only by the convictions of those who are included in the legal community. At first glance this fact would seem to indicate that a treaty is a less important source of international law than customary law, since the latter is

supported by a sense of right which reveals itself in the conduct of many states. Consequently its non-observance by a single state may be expected not only to call forth a reaction but a reaction on the part of many states. In the case of treaty-law, on the other hand, we often have to do with an international law which is binding upon only two or three states and when one of these states refuses to subject itself to the established law, the reaction against its non-observance has only slight significance. We may set against this, however, the fact that a unilateral breach of a treaty is an act so injurious to international intercourse that *pacta sunt servanda* is itself considered a rule of customary law. Consequently the binding force of treaties in general springs not only from the fact that the content of the treaty is supported by a sense of right common to the contracting governments. It is rooted also in the sense of right of all civilized nations, in so far as the rule that treaties must be observed stands as a customary law of all civilized states. Hence the breach of a treaty by one party is not merely a violation of the international law created by treaty but in addition is a violation of the rule of customary international law that a treaty is continuously binding upon the parties which have entered into it.

International law, however, no more recognizes eternally binding obligations than does national law. *Pacta sunt servanda* is true only within limits. It is a postulate which doubtless possesses great value for civilization but which, like all other such values, can claim only a relative validity so far as law is concerned. Conse-

quently when the legal community which has called a treaty into existence disappears, the rule of customary law that treaties must be observed will not keep it in force forever. This point, which concerns generally the internal decay of international law, will be more thoroughly treated in a later section. [1])

D. *Contractual and Declaratory Treaties.* In the preceding argument no distinction has been made between treaties. It has been said merely that all are a source of international law, at least for the community of states which has concluded them. Thus a distinction was neglected which is frequently made, viz., that between a treaty in the sense of a contract, which creates an obligation between the parties, and a treaty in which the harmony of wills is regarded as a declaration or agreement to establish rules of international law. This distinction, however, has no foundation, since rules of international law are established likewise by a treaty in the first sense.

Even juristically there is no opposition between the two. It is held that in a treaty which creates obligations the parties seek different ends; one wants money, the other goods; opposing interests are thus to be satisfied. In law-making treaties, on the other hand, the interests are common or identical and consequently the parties' declarations of will have the same content. We regard this argument as a misunderstanding of the process of law-making which takes place in every treaty. If it were correct that in a contractual treaty each party seeks a different end, there would be no

[1]) Section F below.

harmony of wills and therefore no treaty. A treaty can be made only when the parties seek the same end; and that which *both* parties seek is precisely the validity of those legal rules which have been formulated in the treaty. Every contractual treaty is the expression of a legal community, and the same is true of the so-called declaratory or law-making treaty. The harmony of wills in both cases relates not to an agreement with reference to *interests*, but to an agreement with reference to *law*. If there were an agreement with reference to interests, there would be no need to make law. It is precisely because there is a disparity of interests that the legal value of interests must be fixed. Such a fixing of legal values occurs in both kinds of treaty.

The idea which lies at the basis of this distinction, in our opinion, is probably the following. In the case of treaties which, for example, establish rules regarding neutrality, extradition, or private international law, — what are described as declaratory or law-making treaties, — that which is subjected to regulation is the interest of every state in securing the validity of its own legal standard. Thus the treaty proceeds directly to limit the freedom of the state with respect to legislation. Governments, therefore, confer with one another as *law-making organs* with reference to the legal standard to be prescribed. In the case of the so-called contractual treaties, on the other hand, governments stand opposed to one another as *organs of public interests* though at the same time they act also as *law-making organs*. Thus the distinction between contractual and declaratory treaties expresses the contrast between the

state as a community of interests and the state as a legal community, which has been previously discussed.

If legislation is required for the public interests which fall to the care of the government, the same organ which cares for those interests takes part also in the legislation. If, on the other hand, legislation is needed to preserve interests which are not cared for by the government, and which accordingly are generally not regarded as public interests, then the government acts exclusively as a law-making organ. If one keeps this in view, then the treaty in the first case (when it relates to a contract) has a twofold effect: first, each state's *freedom of legislation* is limited in a specific respect, and second, the government's *freedom in the care of public interests* is curtailed also, in respect to whatever has been set up by international legislation. On the other hand, a treaty in the other case (that is, a declaration) merely brings about a change in the right of the state to legislate according to its own ideas. The distinction between contractual and declaratory treaties, therefore, is a result of the special emphasis given in the first case to the limitation which the government suffers as an organ of interests. This limitation is regarded as a curtailment of the competence of the *state* itself. This, however, is incorrect; it rests on a conful sion between the true conception of the state as a lega community and the conception of it as a complex of public interests for which, at least for the present, the government is the organ. If one holds firmly to the true conception of the state, one can speak of it as being limited or bound only in so far as it is limited

with respect to legislation, and this is the case with all treaties. It may of course follow from this that the government suffers a limitation with reference to its care for public interests, but this is neither more nor less significant than the fact that the establishment of international law may result in limiting the powers of an organ which cares for other than public interests. The peculiarity in the first case lies only in the fact that two different tasks, the care of the law and the care of interests, are performed by one and the same organ, the government. But the state comes into consideration only when the point at issue is the care of the law. It is never concerned in a limitation upon the care of interests, even though as a matter of terminology public interests are described as interests of the state, in accordance with the old idea of the state which developed under absolute monarchy. Limitations upon the care of interests are a constant result of the legal evaluation of interests. It is obvious that it makes no difference whether the interests in question are cared for by the government or by some other agency. But the right clue has been lost when the interests cared for by the government are regarded as interests of the state. From this point of view it is doubtless correct to say that some treaties involve a limitation upon the care of state-interests while others do not. This is the result of the incorrect theory which extends the conception of the state to include the complex of public interests.

E. *Legislation.* The third kind of law-making, legislation, takes place in international law as yet only occa-

sionally. So far as it does occur in this field, it is law-making for specific interests. This is self-evident; if it were otherwise, the community for which the legislature has to make law would be a state, and then the law would cease to be international in character. The making of international law by legislation can take place only where a law-making organ has been created for specific interests. At this point we must pause a moment to define more exactly the nature of law-making in the form of legislation.

International law which arises from treaties gains its importance exclusively from the special legal convictions found in the different states. Its validity results from the reaction of each state's special sense of right upon the rules established by it. But the international legal organization is inadequate. The sense of right which exists in the peoples of civilized states must be able to make itself effective as an autonomous power, independent of its coincidence with the sense of right of any particular state. For this autonomous activity it is necessary, in the first place, that the law be formed by its own organs. And such an organ actually functions when the law is made by a majority of those who participate in the law-making. When the decision is left to the preponderance of conviction, the validity of the law is made independent of the special conviction of each state by itself. In the case of a treaty, the legal convictions of both parties, each taken by itself, must agree regarding the content of the rule, in order that this rule may be valid for both of them. In the functioning of an organ, a majority is sufficient,

and it makes no difference which states have contributed to make up this majority. In this respect statutory law stands on the same plane as customary law. The force of customary law also is founded in the amount of legal conviction which is revealed by the conduct of the majority of states in question. Hence in this case also it makes no difference which states have contributed the legal convictions that support the law. Here too it may be said that an organ functions, though it is only an organ composed of changing members and one which acts by instinct rather than with a clear consciousness.

The composition and competence of such organs will commonly be the result of a treaty. Still it is conceivable that an assembly or a person might develop into a law-making organ and that its competence might be settled by unwritten law, but in international legal relationships this possibility is very nearly excluded. On the other hand, in the case of the state itself it occurs frequently, as for example, when a nation separates itself by revolution from another political community and forms a state for itself, or when the form of government is changed from a monarchy to a republic.

So far as the composition of the law-making organ is concerned, it is commonly composed of officials or of members nominated by the government, with the result that it represents the sense of right only as it exists in government circles. The sense of right which is effective in the nation has, therefore, little influence except as persons connected with the government are

compelled, for the sake of their official activity, to keep in touch with the national sense of right. A direct representation of the nation, an international parliament, is lacking. But the establishment of such a representative body, organized on the model of state-parliaments, will some time become necessary, after the participation of the people in the conclusion of treaties has been secured within the state itself, and after parliament has gained a recognized influence over the administration of foreign affairs.

The competence of this organ for the making of international law will always be determined by reference to the interests for which law-making appears necessary. The international organization of humanity proceeds in the same direction as the organization of a nation within the state. Conscious law-making occurs in a nation or tribe when it seems to be necessary for the care of certain public interests, especially military interests. As more and more interests of this kind require the authority of law, conscious law-making is extended, until finally a full-fledged legislative agency comes into existence. A similar development is to be expected also in the field of international law. The starting-point lies in the care for specific interests by law. As the solidarity of interests between different states increases, law-making organs superior to the states are established, in order that these interests may share the protection of law. Eventually these agencies will be fused into an organization to make effective a world-wide sense of right in every field.

F. *The Internal Transformation of International Law.* Custom, treaty, judicial decisions, and legislation represent different ways in which international law reveals itself externally. But aside from the external causes which form and modify international law, we must consider separately the inner causes which bring about changes in this branch of the law, without these changes being previously established externally in any of the ways mentioned.

These inner causes lie in the nature of law as the precipitate from an evaluation of competing interests. The legal evaluation established in a custom, in a treaty, in the decision of a court, or in an act of the legislature may cease to be valid if there occurs a different conflict between the interests evaluated, to which this legal evaluation is no longer applicable. Externally it remains effective but internally it has lost its binding force.

This internal decay of the law is seen most clearly in the case of treaty-law. An obligation which was looked upon as binding at the time a treaty was concluded may lose its force without being abrogated by all the parties who established it. This happens when the circumstances under which it was concluded, and which at that time led to the acceptance of a legal bond, have so far changed that a different conflict of interests has developed which is no longer provided for in the earlier evaluation. In order to give a new legal evaluation to this shifting worth of interests, law-making for interests within the state is organized in a legislative power. This organization, however, is not always sufficient to keep the law abreast of the changing con-

flicts of interest. Consequently even within the state legal relationships may cease to be effective because of a shifting of the value of the interests which they regulate, although neither the parties concerned nor the legislature has brought about a revision of the earlier evaluation. But such an internal decay of the law is the exception, because we possess within the state an organization for law-making. It is true that this organization is inadequate, but for the most part it enables the law to keep pace with these shifting values. Thus where these inner causes of legal change are at work within the state, it has been possible to classify the cases under certain fixed heads, such as superior force, a case of necessity, etc. But in the field of international relationships such cases occur far more frequently, since here the organization for law-making is still extremely defective and is limited in the main to certain formal rules with reference to the establishment and abrogation of treaties. The new organization for law-making which, as a result of the Hague Peace Conferences, has begun to get under way and which has been discussed by Schücking [1]) in an illuminating manner, can scarcely be taken into consideration as yet, because its action is so slow. Up to the present time, therefore, we have to deal only with law-making by means of treaties. The law created in this manner, however, contains nothing with reference to the reasons which might effect a change in rights and obligations apart from a contractual arrangement directed

[1]) *The International Union of the Hague Conferences*, English translation by C. G. Fenwick, 1918.

especially to that end. Hence the unwritten international law alone can give us any assistance in this case. But even though we cannot deny some significance to this unwritten law, its content in this respect is still so little determined that it is very hard to render it useful in practice except through the loosest of formulas, such as *rebus sic stantibus*. And yet a rule is certainly badly needed where such questions as the following present themselves. Is a given treaty to be recognized as still binding? Are the interests of a given state to be counted as having a higher value than the interests of other states with respect to the importance which they possess for the civilized community? Are these other states, therefore, obliged to accept limitations upon the validity of their interests, or the reverse? Do a state's acts and conduct which further its own interests or injure those of another state violate rules of law which have been established by treaty or custom?

Numerous cases might be mentioned where such questions arise and there exists neither a rule of positive law for settling them nor an impartial judicial authority to take cognizance of them. Consequently, since they must be dealt with, they are settled by the interested states themselves. Some examples may be given. Article 11 of the Treaty of Paris, which forbade the maintenance of warships in the Black Sea, was abrogated by Russia in 1870. Later the Conference of London acquiesced. It is true that on this occasion the great powers declared that a unilateral abrogation of a treaty was contrary to international law; but this

was a *protestatio actui contraria* and it is untrue as a general principle. In 1908 Austria-Hungary transformed the occupation of Bosnia and Herzegovina, established by the Treaty of Berlin in 1878, into an annexation of these countries. In violation of the same treaty Bulgaria had already changed its relations with Turkey on its own authority and had constituted itself an independent kingdom. In 1905 Norway abrogated the union with Sweden. In 1914 Germany violated the neutrality of Belgium and Luxemburg which had been guaranteed by it, that is, by Prussia.

It would be begging the question to pass an off-hand judgment on all these cases by a mere reference to the rule, *pacta sunt servanda*. This adage, which von Liszt[1]) inflates into a "principle forming the foundation of all law," cannot be maintained in its integrity. As a matter of fact, nobody, not even von Liszt himself, regards it as a rule of law which is valid without exception either within or without the state. No, the law does not spring from the will of the parts, neither the law which controls the lives of states nor that which controls the lives of individuals; it springs from the demands which the whole, including all the parts, is able to establish for its *own* development. What these demands are is decided within the state by the legislature. In international relations, on the other hand, there is no sovereign authority to enforce its judgment regarding the modification or the abrogation of the law. Here we have to seek a support for a decision between right and wrong in the unstable foundations of an unorganized

[1]) *Das Völkerrecht*, Ed. 11, p. 167.

legal community. Of these foundations we can name only one which, as history shows, has always turned the scale, when something has been set aside that was originally regarded as law. This is the higher worth which a more inclusive civilization may claim merely because it is more inclusive, as compared with the narrower civilizations into which mankind is divided. Mankind has progressed from small, more or less organized groups, to larger and larger associations, and the value of these larger associations for the development of mankind has always been decisive in fixing the law which should be valid for the parts. To be sure, this is little more than an abstract formula, since this historical process throws no light upon the importance which each part has in the development of the whole. And it is this last point which determines the legal value of the parts and therefore determines whether the law to which each is subject is to be maintained or abolished. Nevertheless what has been said above may be taken as something more than a mere formula, since in any case it makes clear this important point, that the law does not owe its content to that which the parts desire and will and establish in agreements and treaties. In order to determine the importance of a nation, and therefore of the law which it might put into effect, we must put ourselves at the center of the whole of civilization, in comparison with which the nations and their infinitely numerous interests possess only a relative value. But even this relative value suffers continual change, often without our willing or desiring it, whereas there is no organized power which might keep abreast of these

changes and transform the positive law in accordance with them. Hence this is brought about by unorganized means, because it is a law in the highest sense of the word that these shiftings in the value of interests must find expression in the legal order of the community.

The very justifiable desire to avoid so far as possible these unorganized changes, and to make the solution of legal questions independent of the mere strength of the states between which there is a conflict of interests, has caused certain states to make arbitration treaties in order to secure an impartial adjudication of all such conflicts. But it will be a long time before the great powers will follow this example. In order that this should happen it would be necessary above all that certain concrete rules should have developed. Before the great powers will abandon their position of actual superiority, they must have some assurance regarding the possible effects of an arbitral decision upon the continuance both of treaties concluded by them and of rules of international law which have proved satisfactory. They will not be ready to subject themselves to an organ which, however highly endowed with knowledge and the sense of right, will have to render decisions for which it has no other guide than the inchoate sense of right of the family of nations. The smaller states, between which alone general treaties of arbitration at present exist, are now able to develop concrete rules by means of arbitral decisions upon the continuing validity of treaties which have been concluded between them and upon the rules of international law in general; that is to say, they can develop such rules by means of ju-

risprudence. There will never be an organ of international law until the law gets a fairly definite content with reference to the internal decay of international rights and obligations. But once such an organ exists, its acts with reference to this matter may be the means of developing it into a more general organ of legislation.

G. *The Rise of a World State.* The progress of the political organization which leads to the establishment of confederations and federal states must eventually issue in an organ founded upon popular representation which will be able to enforce a world-wide sense of right in every field. The right of a nation to live according to its own law will then have vanished and states will be amalgamated into a single world-empire. This world-empire, which will bring us the One State uniting the whole of mankind, may still be delayed for centuries; but it must not be forgotten that the process which is bringing this empire into being is going on before our eyes. As interests of an international nature increase, the center of law-making is shifted from the states to an ever-broadening legal community. But at present there still remain organs of the states which in their national capacity share in the establishment of international law by means of treaties. The One State will never appear until an organ has developed specially designed to make international law and proceeding from the people themselves. The present states will be related to this One State as its provinces, i. e., as communities equipped, to be sure, with a special law-making organ, but subject to the limitation that this organ has

merely to provide for groups of interests whose legal value is fixed elsewhere.

It is of minor importance, however, to speculate upon a world-state and to search for interests whose legal worth, like that of the interests involved in the abolition of slavery, is already accepted by the whole world. It appears to be more important to note the legal community of civilized nations, since this is the source of really effective international law. The history of the origin of states sheds all the light necessary upon the means by which this community will develop into a state. It is certain that this process does not originate in the organization and centralization of *law-making*. Both of these results have been achieved in most countries in no more than a century. And it is no less certain also that the idea of a state has not realized itself in a nation through the organization and centralization of the *administration of justice*. Nations have become states through the organization and centralization of an apparatus of soldiers, police, and officials which served as an instrument in the hands of individuals to bring about an equal and identical subjection of all. In this way the idea of sovereignty gained a firm footing in the consciousness of men, and contemporary states are the outgrowth of the working of this idea. That the modern idea of the state no longer finds the basis of subjection in the authority of the sovereign, but in the law which is valid by its own force, in no wise alters the significance and the value which the idea of sovereignty has had for the life of the community. Before the autonomous rulership of law can be recognized as an effective

principle, the civilization of a nation must have developed sufficiently for it to feel that its communal life is ruled exclusively by the power of an ethical idea, like that of law. In the centuries which preceded the rise of the modern idea of the state, such a civilization was lacking in the great majority of nations. Thus there was room only for a heteronomous authority, such as is still found in colonies which do not possess self-government. Political theory busied itself earnestly with providing a sanction for this authority. It has based it on the will of God; has found it in the service of the law; has attempted to create for it a legal title of its own through the fiction of a contract which was conceived to call the sovereignty into existence. But it has never been able to give to this authority any other character than that of a heteronomous authority, because it ruled, and could rule, not by virtue of any intrinsic and essential quality, but only by virtue of its external power. The beginning and end of political theory, therefore, was a power existing outside the law, which always revealed itself in the form of a control over the organized, compulsory apparatus of the military and civil service. This sovereign authority is only now beginning to give place to the authority of the law, and thus the rulership of an intrinsic and autonomous power is coming into effect. The life of the national community is now at this stage. This treatise seeks to express this fact by elucidating the modern idea of the state.

The political evolution of the international community *must pass through the phase of the idea of sovereignty*,

just as that of the national community did. This means that the formation of an international state also requires a center of power through which the subjection of mankind, divided among the states, can alone be brought about. The production of an international law and the organization of a world court cannot alone break the national consciousness of power which continually finds new nourishment in the increasing preparations for war. To accomplish this it is necessary to establish a sovereign which, as of old, will enforce the law by means of an instrument of power subject to its orders, and which from the outside will imbue the consciousness of peoples and their leaders with the domination of an ethical power. From this point of view, however, the political evolution of the international community has to contend with many more serious difficulties than had to be overcome in the formation of the existing states. Both the establishment of a sovereignty in and for itself, and its equipment with the means of compulsion, must be achieved consciously. This requires a degree of self-restraint on the part of governments which is difficult to obtain in proportion to the magnitude of the compulsory power which they are now able to exercise. This seems to make an impossible demand upon powerful states. It may be that the consciousness of this impossibility exists in governments and in the social circles where their members move. It may be that unification is not to result spontaneously in an association based on necessity to which a common danger might impel them. If so, that which *must* come may either originate in an association of the smaller

states, less overcome by the drunkenness of power, or it may be born in the lower levels of the population, where frequently higher ideals are to be found than can flourish in a gilded environment. But however the concentration may be accomplished, it is necessary in any event that the international sovereign should possess *independence*. Only thus can the binding force of law be made independent of the states which must be brought and kept under subjection to the law.

We should, therefore, welcome the idea which is gaining ground in the field of international law that the development of the political organization of an international legal community must be sought in the construction of an international sovereign much more than in law-making and the expansion of judicial action. Our countryman, van Vollenhoven, in emphasizing the importance of an international police power, has for the first time given this idea a definite form. He has defended with historical judgment the necessity for a revival, in this connection, of the idea of sovereignty in order to create an international organization. It is not necessary here to decide how far this conception of the construction of an international center of power takes sufficient account of the need for the independence of the sovereign. The idea itself deserves full recognition as a first approach toward the goal and, indeed, is receiving increasing attention. An insight into the need for an independent sovereign is most clearly expressed by the Finnish publicist, Rafael Ehrich, [1]) who would entrust the means of power to an international

[1]) *Probleme der internationalen Organisation*, 1914, pp. 67 ff.

state to be organized for this purpose, to a state *ad hoc*. It is not necessary here to go more deeply into these attempts to find a place for the idea of sovereignty in the international community. They illustrate sufficiently what has been remarked above, that the starting-point for the development of an international community into a state in the modern sense, i. e., into an independent legal community, lies in the establishment of an international sovereign authority. Such a community will come into being, however, only when a legal standard, independent of the different states, can be applied in law-making. And this in turn will occur when a world-wide sense of right has been organized in a manner similar to that which now exists in civilized states. Thus the modern idea of the state will be realized for the entire community of civilized humanity. As a transition stage to this, however, it is necessary that there be a precedent condition, similar to that which developed at the beginning of modern history, when a self-constituted sovereign, standing above the patch-work of legal communities and superior to an unorganized judiciary, was able by means of an instrument of power dependent upon itself alone to imbue the entire people with the idea of authority. In this way alone it was possible for this idea to gain a firm basis in the ethical and impersonal power of the law. In this way alone it is possible at the present time for the same idea to gain a similar basis for the international community.

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normative?

What is his rule of law

Power/right of all individuals or a majority?

Concept of law?

norm?

Objective standard/value?

law

Normative?

Ideal of rule of law?

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